SOME RECENT CRITICISM

OF

GELPCKE versus DUBUQUE

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INTRODUCTORY.

At the very beginning of his study of the law, the attention of the writer was attracted to the famous case of *Gelpcke* v. *Dubuque*,[1] through the medium of a club argument.

He noticed that writs of error to state courts had, in similar cases, never been permitted by the Supreme Court of the United States, and felt that something was wrong, which permitted so inconsistent a result to be reached, *i. e.*, that federal courts would reverse or disregard state decisions, where diverse citizenship gave jurisdiction, and refuse to assume jurisdiction, when such cases applied for admission from the highest court of a state.

As a result of these thoughts, the writer carried in his mind a half-formed purpose to go deeper into the subject, should opportunity offer: a purpose which might never have been realized had it not been for some very recent decisions of the Supreme Court of the United States, which seem to recognize the inconsistency of the two positions assumed by that court, and give him courage to reopen a much-vexed question, knowing that however poorly his efforts may be rewarded, he can scarcely leave the controversy in a worse condition than it now is. The case of *McCullough* v. *The Commonwealth of Virginia*,[2] must serve as an apology for adding another paper to the long list of articles, which have treated of the question involved in *Gelpcke* v. *Dubuque*.

[1] Wall, 175.

[2] 172 U. S. 102 (Dec., 1898).

SECTION I.—STATEMENT OF THE CASE.

The case of *Gelpcke* v. *Dubuque*[1] was brought into the Supreme Court of the United States by writ of error to the Circuit Court for the District of Iowa.

By acts passed in 1847, 1851 and 1857, the legislature had authorized the City of Dubuque to issue certain bonds for the purpose of raising money to assist in the construction of a railroad. These bonds, the acts declared, were legal and valid and "neither the City of Dubuque, nor any of the citizens, shall ever be allowed to plead that the said bonds are invalid." These acts were duly passed upon by the Supreme Court of Iowa, which, during a period of six years and by seven different decisions, declared the said acts to be legal and binding.

Thereafter certain of these bonds came for a valuable consideration into the hands of the plaintiff.

After this transaction the Supreme Court of Iowa declared the acts giving authority for the issuance of the bonds to be unconstitutional.[2] This decision, obviously, overruled the seven previous decisions.

The City of Dubuque having failed to pay the coupons, when presented, the plaintiff brought suit in the Circuit Court of the United States, by virtue of the diverse citizenship of the parties. The city pleaded, *inter alia*, that the acts authorizing the issue of the bonds in question were unconstitutional and void, relying on the case of *Iowa* v. *County of Wapello*.[3]

It is not proposed at this point to go into the principles of the decision, nor into the correctness of the views advanced. Suffice it for the present, to say that the Circuit Court having adjudged for the defendant, feeling itself bound by the decision of the state court, the United States Supreme Court reversed the decision and sent the case back for further proceedings.

While commentators and judges differ as to the reasons which were in the mind of the court, this much, at least, is

[1] 1 Wall, 175.

[2] State of Iowa *ex relatione v.* The County of Wapello, 13 Iowa, 388.

[3] *Supra.*

certain: The Supreme Court disregarded the decision of the State Court of Iowa, which declared the bonds void, and held them to be valid.

In addition, it may be mentioned that the State Constitution had been unchanged from the time of the passage of the acts authorizing the issuance of the bonds. Also that it was assumed that the compliance with the terms of the acts was perfectly regular.

Mr. Justice Swayne delivered the judgment of the court in a short opinion, which has given rise to much criticism on account of some rather unfortunate expressions which that learned justice permitted to escape him. Mr. Justice Miller dissented with no uncertain voice in an opinion which has become famous as the foundation of the arguments of the opponents of *Gelpcke* v. *Dubuque*.

Section II.—THE PRINCIPLE UPON WHICH THE CASE WAS DECIDED.

The only undisputed point decided in *Gelpcke* v. *Dubuque* was that the bonds held by the plaintiff were valid, in the face of a state decision adjudging them void.

Many different reasons have been assigned as being the basis of the court's decision. These reasons have, in most instances, been advanced by the writers who intended later to demolish them, consequently they have not been uniformly accepted as laying down sound rules of law.

The question is, why did the Supreme Court, since they professed to be administering the law of the state, feel at liberty to disregard a state decision, adjudging these bonds void? It is the purpose of this section to answer that question. Before doing so, we wish to lay the ground by proving that

A. The federal courts are bound absolutely to accept the state courts' construction of state statutes.

The rule of law as above laid down is one very familiar to every student of constitutional law. We believe the truth of the principle has never been directly disputed. Various text

writers have hazarded the idea, however, that in particular cases dealing with contracts, because the court thought that injustice would otherwise be worked, it has felt at liberty to engraft exceptions upon it.

Professor Pepper has admirably treated the whole controversy between federal and state decisions in his little book, "The Border Land of Federal and State Decisions." He says that the Supreme Court, because of some fancied supervision over contract rights, have broken through the rule in some instances.

It is submitted that while in very many cases expressions have been let fall by the courts, which seem to justify such an observation, yet that those *decisions* are really founded upon a principle which does not in any way throw discredit upon the rule as above laid down. We hope to be able to show, not only on principle, but by authority, that in no instances are the federal courts at liberty to go to the length of foisting a law of their own construction upon a sovereign state. The establishment of this principle is so essential to the reasoning that follows, that a rather extended investigation may perhaps be permitted.

For a full discussion of the conflict between federal and state decisions, we cannot do better than to refer to Professor Pepper's book, mentioned above. It may not be amiss, however, to briefly recapitulate the general principles, in order to prepare the way for a more detailed examination in the case of statutory construction.

The circuit courts of the United States were primarily established, that an impartial tribunal might be provided, wherein citizens of different states might obtain justice, unbiased by the influences surrounding the state courts. These courts, therefore, were to administer the laws of the state in which they were sitting, and not to expound it for themselves; but this rule, while strictly true as above stated, requires a further explanation. By "laws of the state" in this sense are meant laws purely local in their character. Laws originated by the state, and peculiar to it, as opposed to general laws, which may have been adopted and applied by state

courts. These two classes of laws were early distinguished and will be incidentally referred to in tracing the growth of the principle involved.

(a) Where the law was essentially a law of the state, deriving its validity from the state, and applied peculiarly within it.

(b) Where the law was a general one, equally applicable to all the states unless altered by legislation.

In the former case it is perfectly plain that the state law is binding on the federal courts, when they profess to be administering the law of the state. In the second case, although the rule is well settled, the principle is not quite so plain.

On the one hand, it is contended that whether the law originated within or without the state, if it has been adopted by the state tribunals, and applied within the limits of their jurisdiction, it becomes a law of the state, just as much in the latter case as in the former; that the law as thus construed is just as binding within the state, and should be as conclusive on the federal courts, as though it were a positive statutory enactment.

On the other hand, it is admitted that where a law is promulgated by the state, either by legislative enactment or by virtue of local real-property rules, the state court is the ultimate judge of its meaning and construction. In such a case, it is said, the court has the authority to declare, as a finality, what the law is. Its judgment is not open to question by any other court in existence. But it is otherwise if the state court passes upon the meaning of a general law. Here it has no especial authority to interpret. It may declare its opinion, which is binding within the state, but not upon courts having concurrent jurisdiction. In the one case the state court announces what the law is. In the other it expresses its opinion.

As will be noticed from an examination of the cases, the courts have adopted the latter view. This position has been the mark of much criticism by text writers. We do not feel competent to express an opinion, knowing that to do so would be to oppose at least some eminent writers, who seem not always to agree. As this paper concerns only a particular branch of the local law, it is not necessary to continue further

this phase of the discussion.[1] Whether the federal courts are justified in refusing to follow in cases involving questions of general law, cannot affect the point which it is here proposed to establish, as we shall confine the discussion to cases involving the interpretation of state statutes. As will be shown later, the interpretation becomes a part of the statute, so that the federal courts are no more at liberty to disregard it, than they are to disregard the positive statutory enactment. A federal court may, for constitutional reasons, refuse to *apply* a state law as construed by a state court, but the federal court must follow the state interpretation.

One of the earliest cases to lay down this rule was *McKeen* v. *DeLancy's Lessee*,[2] in which Mr. Chief Justice Marshall declared that while *his* construction of a Pennsylvania statute under consideration would differ from the one given to it by the Supreme Court of Pennsylvania, yet he considered himself bound to follow the state construction, saying: that if a contrary rule were adopted, "infinite mischief would result."

The same principle was again recognized in 1817, in the case of *Shipp* v. *Miller's Heirs*.[3] Mr. Justice Story, delivering the opinion, says, referring to a decision of the Kentucky Supreme Court, "this is a decision upon a local law, which forms a rule of property, and this court has always held in the highest respect decisions of state courts on such subjects. We are satisfied it is a reasonable interpretation of the statute, and upon principle or authority we see no ground for drawing it into doubt."

It will be noticed that the language of the eminent justice was here not so clear and decided, as will be shown in later cases. He declares that the Supreme Court accepts the state construction, both because the state is entitled to construe her own laws, and because the construction was "reasonable." The language of the same judge in later cases shows that he adopted the view that the federal court was bound to follow

[1] See "The Borderland of Federal and State Decisions,"

[2] 5 Cr. 22 (1809).

[3] 2 Wheat. 315 (1817).

and adopt local state laws, both as to the act itself, and its construction, whether reasonable or not.

The next important case was *Polk's Lessee* v. *Wendell*,[1] in which a question arose as to the construction of a property right by the court of Tennessee. The court say, "We will respect the decisions of the local tribunals, but there are limits which no court can transcend." This language sounds as if the learned justice intended to arrogate to the United States court the ultimate construction of a local law, if they were of the opinion that the limits had been "transcended." However, the remark is deprived of some of its force by the next sentence, "But the courts of Tennessee have not so decided." Mr. Justice Johnson, who delivered the opinion, seemed to be a little fearful of committing himself openly to the doctrine that the federal courts are compelled to follow in all cases of local law.

However, all doubt was set at rest by the next decision, delivered in 1825, when the court definitely and clearly announced its inability to interpret state laws. This was the case of *Elmendorf* v. *Taylor*,[2] which was an appeal from the Circuit Court of Kentucky. A bill in equity was brought to compel a conveyance of land. The defendants relied upon their patent. The plaintiff relied upon his entry, and to substantiate it, upon certain acts of the legislature, by virtue of which he contended he had a good title. The construction of these acts was one of the questions at issue. The court decided that the construction given by the Supreme Court of the state was binding upon them. Chief Justice Marshall delivered the opinion of the court. On page 159 he says: "This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that gov-

[1] 5 Wheat. 293 (1820).
[2] 10 Wheat. 159 (1825).

ernment. Thus no court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute."

As far as we are aware, this was the first decision to lay down this rule in so definite and unqualified a manner. The language of the court was here capable of perhaps even broader application than later decisions approve, but while its scope may have been narrowed, its soundness has never been questioned. Two years later (1827) the now well-settled principle that the federal courts are bound to follow local laws of real property, even though they do not depend on statute law, was definitely expressed. This was in the case of *Jackson* v. *Chew*.[1] The case came up on a writ of error to the Circuit Court for the Southern District of New York. It involved a dispute over the meaning of a clause in a will. As was pointed out by Mr. Justice Thompson, in delivering the opinion of the court, the law of New York had been firmly settled on that point. The court felt bound to follow the interpretation put upon these words by the state court, and rested their decision on that ground. It was contended in the argument that the rule that the federal courts are bound to follow the state courts, applies only to cases of constructions of state statutes or constitutions. The court, however, while admitting most of the decided cases to be of that nature, say, "But the same rule has been extended to other cases, and there can be no good reason assigned why it should not be, when it is applying settled rules of property. This court adopts the state decisions, because they settle the law applicable to the case, and the reasons assigned for this course apply as well to rules of construction growing out of the

[1] 12 Wheat. 162 (1827).

common law, as the statute law of the state, when applied to the title of lands." This case also, it will be noted, recognizes the rule as well settled in cases involving statutory construction. It is cited as of interest in tracing the development of the principle under discussion.

During the fifteen years following *Jackson* v. *Chew*, no less than eight well-considered cases unqualifiedly affirmed the principles expounded in *Elmendorf* v. *Taylor*.[1]

The principle is so well and so emphatically laid down in *Green* v. *Neil's Lessee*[2] that the case is here stated, though it will be again touched upon later. *Green* v. *Neil* came to the Supreme Court by a writ of error to the Circuit Court of the United States, for the District of West Tennessee. It was an action of ejectment. The defendant claimed title by limitation. The plaintiff disputed his claim, not on a question of the facts, which were admitted, but on a question of construction of the Tennessee statute of limitations. Some years prior to the suit in question, a construction favorable to this plaintiff had been adopted by the Supreme Court of Tennessee, and followed by the Supreme Court of the United States. The Circuit Court felt bound to follow these decisions, and directed a verdict for the plaintiff, which was the cause of error assigned. The Supreme Court of Tennessee had, subsequent to the above mentioned decision, reversed its previous ruling and adoped a construction of the statute of limitations which was favorable

[1] Shelby *v.* Guy, 11 Wheat. 361 (1826), Johnson, J., "That the statute law of the states must furnish the rule of decision to this court, . . . no one doubts;" Gardner *v.* Collins, 2 Pet. 58 (1829), Story, J.; McClung *v.* Silliman, 3 Pet. 270 (1830), M'Lean, J., "The state construction is the law of the forum;" United States *v.* Morrison, 4 Pet. 124 (1830), Marshall, C. J.; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99 (1830), Thompson, J.; Ross *v.* M'Clung, 6 Pet. 283 (1832), Marshall, C. J., "The questions which grow out of the language of the act, so far as they have been settled by judicial decisions (referring to state decisions), cannot be disturbed by this court;" Green *v.* Neil's Lessee, 6 Pet. 291 (1832), M'Lean, J.; Bank of United States *v.* Daniel, 12 Pet. 32 (1838), Catron, J.; Ross *v.* Duvall, 13 Pet. 45 (1839), M'Lean, J.; Harpending *v.* Dutch Reformed Church, 16 Pet. 455 (1842), Catron, J.; (only the principal cases which we have examined are cited. They may not include all the cases decided during this period which bear on the question).

[2] *Supra.*

to the defendant in this case. On this writ of error the Supreme Court of the United States declared itself bound to adopt the last construction put upon the statute by the state court, reversed its own decisions and sent the case back for a new trial. Mr. Justice McLean, for the court, says (star p. 298): "The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. A reference is here made not to a single adjudication, but to a series of decisions which shall settle the rule. Are not the injurious effects on the interests of the citizens of a state, as great in refusing to adopt the change of construction, as in refusing to adopt the first construction? A refusal in the one case, as well as in the other, has the effect to establish in the state two rules of property.

"Would not a change of construction in a law of the United States, by this tribunal, be obligatory on the state courts? The statute as last expounded would be the law of the Union? and why may not the same effect be given to the last exposition of a local law by the state court? *The exposition forms a part of the local law*, and is binding on all the people of the state, and its inferior judicial tribunals. It is emphatically the law of the state, which the federal court, while sitting within the state, and this court, when a case is brought before them, is called to enforce. If the rule as settled should prove inconvenient or injurious to the public interests, the legislature of the state may modify the law or repeal it.

"*If the construction of the highest judicial tribunal of the state form a part of its statute law, as much as an enactment of the legislature, how can this court make a distinction between them?* There could be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government, in the exercise of its acknowledged functions, should by construction give a different effect to a statute, from what had at first been given to it. The charge of inconsistency might be made with more

force and propriety against the federal tribunals for a disregard of this rule, than by conforming to it. They profess to be bound by the local law, and yet they reject the exposition of that law, which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act which was adopted by the federal court. The inquiry is, what is the settled law of the state at the time the decision is made? This constitutes the rule of property within the state, by which the rights of litigant parties must be determined."

It will be noted that this case puts a state court's construction of state laws upon the same plane as the statute itself. Each is equally conclusive as to what is the law of the state. It follows, therefore, that *a federal court cannot disregard the former any more than it can the latter* when it is administering state law.

Up to this point the courts have applied this doctrine generally to the law of the state, without going into distinctions as to what is, and what is not, local law. However, in 1842, the famous case of *Swift* v. *Tyson*[1] was decided, which limited the rule in terms to statute law and local laws of real property. That case came up on a writ of error to the Circuit Court for the District of New York. It was an action on a bill of exchange. The question certified to the Supreme Court for decision was whether the plaintiff, who had received a note in payment of a pre-existing debt, was a holder for value. The earlier decisions of the Supreme Court of New York seemed to decide that, under such circumstances, he was. Later decisions oscillated to some extent, but seemed to return at the last to the original view. The question then arose as to whether the United States Court would follow the New York view of the law. Waiving the question as to whether the rule was actually settled in the New York courts, Mr. Justice Story declared that, for the purposes of this case, the point was of no vital importance because, at any rate, the United States courts were not bound by the decisions of the New York courts. He pointed out that the decision of this question

[1] 16 Pet. 1 (1842), Story, J.

involved no statute or local law of New York. That it was purely a case to be decided on principles of general commercial law. That such had been the view of the New York courts in rendering their decisions. They did not, and could not, claim any authority so to settle a question of general law as to bind the courts of the United States.

Prof. George Wharton Pepper, in his work entitled "The Border Land of Federal and State Decisions," has very severely criticized the opinion of Mr. Justice Story in this case. Professor Pepper points out, among other things, that it was the intention of the founders of the Constitution for the federal courts in such cases to administer solely the laws of the state. That they were not, in any sense, to investigate the law for themselves, but to devote their whole energy to an effort to discover what the law of the state might be. There can be no doubt of the correctness of this statement. It is respectfully suggested, however, that *Swift* v. *Tyson* does not necessarily contradict that intention. It does not deny the duty of the federal courts to follow the state courts' construction of laws peculiarly state laws. What it does decide is, that general commercial law is not state law. Whether the founders of the Constitution intended to make that distinction, or whether they could have realized its importance at that time, had it been brought before them, may, perhaps, be disputed.

As the discussion of this and similar decisions is only incidental to the line of argument in this paper, it is not proposed to go into this case on principle.

Apropos of Professor Pepper's suggestion as to the early views of the functions of the Supreme Court, however, it is interesting to note that, in the earlier cases which we find reported, the judges do not seem to be at all sure that they are absolutely bound to follow the state courts, though they profess the "highest respect" for their judgment.[1] Indeed, Professor Pepper, himself, points out a very early case, *Wilson* v. *Mason*,[2] in which the principle seems to be not admitted.

[1] See M'Keen *v.* DeLancy's Lessee (1809); Shipp *v.* Miller's Heirs (1817); Polk's Lessee *v.* Wendell (1820); *Supra*, pp. 6, 7.

[2] 1 Cr. 24.

It was not until the case of *Elmendorf* v. *Taylor*[1] (1825), that the court definitely declared the doctrine to be settled.

As the opinion in *Swift* v. *Tyson* contains a clear exposition of the duty of the court to adopt state decisions in cases involving strictly local law, we insert here an extract from it: "It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive fixed or ancient local usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended that the thirty-fourth section of the Judiciary Act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are at most only evidence of what the laws are; and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, *and the construction thereof adopted by the local tribunals.*"

Before leaving this phase of the subject it may not be out of

[1] *Supra*, p. 7.

place to remark that, as far as we are able to say, after making a diligent search, no Supreme Court decision has ever thrown discredit upon *Swift* v. *Tyson*, though it has been the mark of some adverse criticism both by text writers and by a few state courts.[1] Whether *Swift* v. *Tyson* is right or wrong cannot affect the principle under discussion, because the case expressly admits that the federal courts are bound to follow in all cases of purely local law.

Up to this point we have shown that in cases involving local law, by which is meant statute law and laws involving local real property rules, the federal courts are bound to accept the interpretation of the state court as final. We now meet a qualification, if such it may be called. About the same time as *Swift* v. *Tyson*, the case of *Groves* v. *Slaughter*[2] was decided. It laid down the perfectly plain proposition, that when there are no state decisions to aid the federal court in its investigation of the law of the state, the federal court must construe for itself. This does not mean that the federal court engrafts a law, or an interpretation of a law upon a state. It means merely, that where it has no light from state decisions, to use the court's expression in *Groves* v. *Slaughter*, it must seek the interpretation from the ordinary rules of the common law. Then if the state court puts a different construction upon

[1] In Forepaugh *v.* R. R., 128 Pa. 217 (1889), McCollum, J., declared that the distinction laid down in Swift *v.* Tyson was illogical and unsupported either by reason or authority. The state courts generally have adopted the rule, that the law of the place where the contract was made should govern, and do not seek to follow the lead of the federal courts, and interpret such questions for themselves.

On the other hand, the federal courts have steadily adhered to the doctrine as laid down in Swift *v.* Tyson. In the following five leading cases, the doctrine is re-affirmed with great emphasis, the cases dating from 1855 to 1893: Watson *v.* Tarpley, 18 How. 517 (1855), Daniel, J.; Chicago *v.* Robbins, 2 Black, 418 (1862), Davis, J.; R. R. *v.* Lockwood, 17 Wall. 357 (1873), Bradly, J.; Town of Venice *v.* Murdock, 92 U. S. 494 (1875), Strong, J.; Liverpool Steamship Co. *v.* Phœnix Ins. Co., 129 U. S. 397 (1888), Gray, J. "In questions of commercial law, United States courts will not follow state courts, even when they obtain jurisdiction by diverse citizenship:" The Guildhall, 58 Fed. 796 (1893), Brown, J.

[2] 15 Pet. 449 (1841).

the statute, the federal court must change its view and follow suit.

It remains only to examine further authorities in support of the rule thus narrowed in its application. The law on this point is so well settled that it would be vain to cite further authorities, were it not for the desirability of establishing not only the general principle, but also the exact import and significance of the rule as laid down by the courts, in both majority and minority opinions.

In *State Bank of Ohio* v. *Knoop*,[1] Mr. Justice McLean for the court, says, "The rule observed by this court to follow the construction of the statute of the state by its Supreme Court, is strongly urged. This is done when we are required to administer the law of the state. The established construction of a statute of the state is received as a part of the statute." The court then went on to distinguish the case before it, but did not question the rule in cases where the federal court is administering the law of the state.

In a dissenting opinion in the same case, Mr. Justice Catron observed: "If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity that I suppose could exist with any one, is that the construction is not settled. . . . Whether this construction given to the State Constitution is a proper one is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us than state courts and judges can question our construction of the Constitution of the United States."

In *Gelpcke* v. *Dubuque*, Mr. Justice Miller, dissenting, declared that "the general principle is not controverted by the majority; that to the highest court of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States,

[1] 16 How. p. 369 (1853), M'Lean, J.

or with some law or treaty made under it. Nor is it denied that when such a construction has been given by the state court, that this court is bound to follow it. The cases on this subject are numerous, and the principle is as well settled, and is as necessary to the harmonious working of our complex system of government, as the correlative proposition that to this court belongs the right to expound conclusively, for all other courts, the Constitution and laws of the Federal Government."

The cases dealing with the naked principle are so overwhelming in their approval, that it does not seem necessary or profitable to continue further an examination of the cases in the text. It may be well, however, to call attention to one later case, *Burgess* v. *Seligman*,[1] in which the principle was referred to as being free from doubt. Mr. Justice Bradley, delivering the opinion, pointed out that when the law had not been construed by the state court, the federal court might construe for itself, and then declaring it to be the duty of the federal court to follow where the law is settled, continues, "This is especially true with regard to the law of real estate and the construction of state statutes and constitutions. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is."[2]

Without elaborating further on this phase of the question, a few additional cases are cited in the note. All of these have been examined, and in all of them it is emphatically asserted that the federal courts, except in the case mentioned above, are absolutely powerless to construe state statutes or state constitutions.[3]

[1] 107 U. S. 20 (1882), Bradley, J.

[2] It is submitted that this case went too far in holding the law to be unsettled.

[3] Porterfield *v.* Clark, 2 How. 76 (1844), Catron, J.; Nesmith *v.* Sheldon, 7 How. 812 (1849), Taney, C. J.; Williamson *v.* Berry, 8 How. 495 (1850); Van Rensselaer *v.* Kearney, 11 How. 297 (1850), Nelson, J.; Webster *v.* Cooper, 14 How. 488 (1852), Curtiss, J.; Beauregard *v.* New Orleans, 18 How. 497 (1855), Campbell, J.; Union Bank of Tennessee *v.* Jolly's Adm'rs, 18 How. 503 (1855), Wayne, J.; Amy *v.* Allegheny

We now approach that class of cases, represented by the principal case under discussion in this essay, where contract rights are involved. The decisions of this class have been the subject of much criticism, both hostile and favorable, ever since the first one of the line was decided. The principle upon which they are based seems to be hidden in mystery, if we are to judge from the various and miscellaneous opinions hazarded by text-writers. We desire to arrive at this principle partly by a process of exclusion. That is the purpose of this section, viz.: to show that the court could not possibly have arrogated to itself the right to construe a state law without deliberately overthrowing an overwhelming consensus of Supreme Court authorities. The examination of these cases will be postponed to the next section.

Before leaving the discussion of the rule enunciated at the head of this section, however, we may perhaps be pardoned a brief examination of its correctness, on principle.

It is obvious that it would be quite beyond the scope of this paper to go deeply into the question of the relative powers of the state and the Federal Government. It is plain, however, that the Government of the United States is one of purely delegated powers. It has not any inherent sovereignty over the people of the United States. It was created by the instrument which both confers and limits its powers. It follows that it possesses no powers, except those either expressly or impliedly conferred upon it, by the Constitution.

City, 24 How. 364 (1860), Wayne, J.; Rice *v.* R. R., 1 Black. 374 (1861); Nichols *v.* Levy, 5 Wall. 433 (1866), Swayne, J.; Prov. Ins. Co. *v.* Mass., 6 Wall. 611 (1867); Randall *v.* Brigham, 7 Wall. 523 (1868), Field, J.; Gut *v.* The State, 9 Wall. 35 (1869), Field, J.; Aicardi *v.* The State, 19 Wall. 635 (1873), Swayne, J.; R. R. *v.* Ga, 98 U. S. 359 (1878); Baily *v.* Magwire, 22 Wall. 215 (1874), Davis, J.; Town of Venice *v.* Murdock, 92 U. S. 494 (1875), Strong, J.; Davis *v.* Indiana, 94 U. S. 494 (1876), Miller, J.; Stone *v.* Wisconsin, 94 U. S. 156 (1876), Waite, C. J.; East Oakland *v.* Skinner, 94 U. S. 255 (1876), Hunt, J.; Boyd *v.* Ala., 94 U. S. 645 (1876); Town of South Ottawa *v.* Perkins, 94 U. S. 261 (1876); County of Leavenworth *v.* Barnes, 94 U. S. 70 (1876); Adams *v.* Nashville, 95 U. S. 19 (1877); Hall *v.* De Cuir, 95 U. S. 485 (1877), Waite, C. J.; Sanborn *v.* County Com., 97 U. S. 181 (1877); R. R. *v.* Gaines, 97 U. S. 697 (1878); Fairfield *v.* Co. of Galatin, 100 U. S. 418 (1879); Lewisohn *v.* Steamship Co., 56 Fed. 603 (1893), Benedict, J.

On the contrary, it is equally well settled that the states do possess an inherent sovereignty over their subjects. By adopting the Constitution they gave up to a central government, by them created, certain of their inherent functions. All the powers not so delegated were retained by the states.[1] This is true equally of any department, whether legislative, executive or judicial. This is clearly pointed out by Mr. Hamilton in the *Federalist*. He says: "The principles established in a former paper teach us that the states will retain all pre-existing authorities which may not be exclusively delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the Union; where a particular authority is granted to the Union and the exercise of a like authority is prohibited to the states; or where an authority is granted to the Union, with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as the latter. And under this impression *I shall lay it down as a rule, that the state courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.*"[2]

If, by the Constitution, the states gave up the right which they possessed, to construe their own laws, then the federal power must exercise this duty. If, on the other hand, such right was not delegated to the Federal Government, then it can possess no such right. It either was, or was not, so delegated. It must be either one or the other. It might be delegated, very possibly, in some instances and not in others; but in any given situation the federal courts' right to construe must be derived from the Constitution, or it does not exist. There can be no discretionary power, because of a "fancied supervision over contracts," or for any other reason. This seems almost too plain for argument.

[1] See Amendments to the Constitution of the United States, Art. X.

[2] The *Federalist*, No. LXXXII, pp. 572–3.

It is scarcely necessary to refer to the constitutional provisions, for it has never even been claimed that such rights were delegated to the Federal Government. In Art. III, Section 2, the cases in which the federal courts shall have jurisdiction are enumerated. Among these is not a provision that the federal courts shall construe state statutes, neither is there any mention of a "general supervision over contracts" granted to these courts. The right of a state to interpret its own laws is inherent and exclusive. The situation is precisely the same as if the two courts belonged to different nations. This analogy was drawn in *Elmendorf* v. *Taylor*.[1] As pointed out above, the court say in that case "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

Cooley, in his book on "Federal Limitations," lays down the rule as follows: "But the same reasons, which require that the final decision upon all questions of national jurisdiction should be left to the national courts, will also hold the national courts bound to respect the decisions of the state courts, upon all questions arising under the state constitutions and laws, where nothing is involved of national authority, or of right under the constitution, laws, or treaties of the United States; and to accept the state decisions as correct and to follow them, whenever the same questions arise in the national courts."[2]

The same thought is expressed throughout his work by Hon. J. I. Clark Hare. He says (p. 23) that the national Government "would be supreme throughout the whole range

[1] *Supra*, p. 7.
[2] Cooley's "Federal Limitations," p. 20–21.

of its powers, but yet being confined within fixed limits, would not divest the jurisdiction of the states over the matters committed to their care. State sovereignty would remain, although curtailed in its proportions."[1]

This principle is so well settled as to be not open to doubt. As the state is not given up its inherent right to construe its own laws, its right is paramount and exclusive.

The idea that the federal courts are bound to follow state decisions as a matter of obligation Professor Pepper (p. 71) declares has been absolutely repudiated by the courts. In view of such an expression by an author, whose opinion is so eminently worthy of careful consideration, it is with great hesitation that we acknowledge holding a contrary view.

When one glances over the field of conflict, he is irresistibly impressed, at first, with the thought that the federal courts have, as it were, taken the bit in their teeth and brushed aside all restraining power, breaking through the rules at will. A more careful examination will, however, show more of method than at first glance appears.

We see first a group of cases, where the questions involved are confined to *local* law as heretofore explained. We have yet to see the first case which shakes the rule that the federal court is bound to follow; the reason uniformly given for this obligation is that the federal court is as fully bound to apply the construction as to apply the law itself, by reason of the state's sovereignty in that field.

We next perceive a group, which the courts have said, rightly or wrongly, do not involve questions of local law. Here, obviously, the state decisions are not followed, but the principle is not denied.

Lastly we see a group in which the federal courts have refused to *apply* a state court's change of interpretation because such later interpretation, thus applied, would infringe some clause of the federal Constitution. To this latter class belong the cases represented by *Gelpcke* v. *Dubuque*. To show this shall be the purpose of the next section.

[1] Am. Const'l Law, pp. 23.

ERRATA.

Page 20, sixth line, read "has" for "is."

Page 27, note, Ray *v.* Gas Co., 138 Pa. 576.

B. The decision was based on the theory that the state courts' reversal of interpretation of the statute was a law impairing the obligation of contracts.

The purpose of the preceding section will become more evident as we proceed. We have attempted to show, and it is believed that it has been shown, that in cases involving statutory construction, the federal courts have acknowledged their duty to adopt the judgment of the state court as final.

It has often been said, however, that *Gelpcke* v. *Dubuque* and kindred cases form an exception to that rule. On principle it is clear that *Gelpcke* v. *Dubuque* must be justified, if at all, on one of three grounds:

(1) On the theory that the federal courts are not bound to follow state constructions.

(2) On the theory that the rule, as above laid down, exists, but that there is an exception, for some occult reason, in the case of contracts.

(3) On the theory that a federal question was involved. If the decision can be explained, without adopting one of these views, we are unable to comprehend that explanation.

The foregoing section has proven that the first view is untenable, even if it had ever been urged. We believe that the same principle, as there investigated, renders impossible the second view. It is not necessary here to further elaborate on the principle as discussed in the latter part of the preceding section. As there stated, the federal courts, either have, or have not, the right to construe state statutes. If they have not, and we have shown that they have not, then, where the power does not exist, no "exceptions" can arise. This on principle seems plain. But, it is said, the federal courts have made an exception. This, however, begs the question. In the first place, it is not a legitimate argument for the correctness of a principle discussed on *a priori* grounds, to cite a decision; and, in the second place, it is yet to be demonstrated that these cases were decided on that principle.

All text writers who advance the "exception" theory, declare, at the same time, that the theory is unsound. This

brings us to the conclusion towards which all the argument so far has been directed. *Either Gelpcke* v. *Dubuque is a wrong decision, or else it involves a federal question.* Having on principle reached this conclusion, we proceed to find out what was, in fact, the basis of the decision.

Ever since the case was decided, text writers have been advancing theories upon which, in their opinions, the case was rested. Professor Thayer, in an article in the *Harvard Law Review*[1] upholds the decision, but places it upon the ground of *bias*. That is, he says, where the federal courts have reason to believe that the state courts have been partial in administering the state law, they can, themselves, entirely disregard the state law. This seems to be a remarkable conclusion. As Professor Thayer, himself, says, one reason for establishing the Circuit Courts, was to provide an impartial tribunal wherein the *law of the state* should be administered; and yet in order to administer impartially that *law of the state*, the federal courts may entirely disregard it, and administer some other law, for it must be conceded that the decisions of the state court are what, within the thirty-fourth section of the Judiciary Act, do constitute the law of the state. From the standpoint of at least one of the parties, who has a legal right to have the law of the state applied to his case, this would scarcely seem to be a notable instance of impartiality. To allow such a latitude as this, in the case of "bias," would be to give the federal courts an unlimited right to disregard state laws whenever they see fit to do so. With the greatest respect for the eminent writer, it is submitted that the decision cannot be supported upon this theory, and there is no ground for believing it to have been the basis of the court's opinion.

Hon. Henry Reed, in his article entitled "The Rule in Gelpcke *v.* Dubuque,"[2] makes an exhaustive examination of the cases, and ends by declaring *Gelpcke* v. *Dubuque* to be an anomalous case, which is unknown elsewhere in the law. He does not seek the principle upon which it was founded, but contents himself by saying that the decision was just, has not

[1] 4 Harv. Law Rev., 311 (1891).

[2] 9 Am. Law Rev., 381 (1871).

been overruled, and was made necessary by peculiar circumstances. This may be a satisfactory conclusion to the utilitarian, but is certainly most disappointing to a student of law. The fact that the decision is just, should lend additional diligence to the search for its underlying principle, but of itself is not a sufficient answer to legal objections to its soundness.

Professor Pepper, in his book above referred to, seems to think the decision recognizes an exception to the duty of the federal courts to "follow," and therefore questions its soundness.

Mr. William B. Hornblower[1] and Mr. Conrad Reno,[2] in two well considered articles, support the case on the theory that it involves a federal question.

Mr. William H. Rand, Jr.,[3] places the decision upon the same ground, but intimates his opinion that it cannot be supported.

Professor Patterson says that under the word "law," as used in the federal clause forbidding states to impair the obligation of contracts, is included "judicial decisions of state courts of last resort, rendered subsequently to the making of the contract in question, and antecedently to the suit in which the court determines the invalidity of the contract, and altering by construction the constitution and statutes of the state in force when the contract was made,"[4] citing *Gelpcke* v. *Dubuque*.

Mr. Cooley also places the decision on the ground that the federal clause was violated.[5]

The case is referred to without comment in a note to Story on the Constitution.[6] No reason is given for the conclusion reached therein.

Hon. J. I. Clark Hare, however, gives a careful discussion of the entire series of cases represented by *Gelpcke* v. *Dubuque*, and clearly intimates his opinion that the case was decided on

[1] 14 Am. Law Rev. 211.
[2] 23 Am. Law Rev. 190.
[3] 8 Harv. Law Rev. 328.
[4] Federal Restraints on State Action, pp. 146–147.
[5] Cooley's Principles of Const. Law, p. 312.
[6] Vol II, pp. 575-576.

the theory that the state courts' decision was a "law" within the meaning of the federal clause.[1]

Enough has been said to show that text writers generally, certainly all whose works are recognized as standard authorities, concur in the opinion that the decision in *Gelpcke* v. *Dubuque* was founded on the theory that a federal question was involved. But however much we may prize the opinions of writers, after all the best source of knowledge is the case itself, and the comments upon it in later opinions of the same court.

Mr. Justice Swayne delivered the opinion. His language has been the subject of much adverse comment. It must be conceded that the learned justice leaves much to be desired. However, if his opinion be examined with a view to discovering the underlying principle which was in the mind of the court, it is thought that the examination will not prove so unsatisfactory as at first appears. In the first place, we must assume that the rule that the federal courts are bound to follow the state courts' construction of their own laws, was present in the mind of Mr. Justice Swayne. The strongest proof of this is the language of Mr. Justice Miller, dissenting. He says, "The general principle is not controverted by the majority, that to the highest courts of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the state court, that this court is bound to follow it." Further, he calls attention to the language of Mr. Justice Swayne in the case of *Leffingwell* v. *Warren*,[2] which was decided at the next preceding term of court. In that case Mr. Justice Swayne says, "The construction given to a state statute by the highest judicial tribunal of such state, *is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.* . . . If the highest judicial tribunal of a state adopt new views as to the proper construction of such a

[1] Hare's American Const. Law, pp. 721–726.

[2] 2 Black, 599.

statute, and reverse its former decisions, this court will follow the latest settled adjudications." No language can be more clear or explicit than this. It is impossible to believe that Mr. Justice Swayne could have overlooked this principle in preparing his opinion. We assume that it was in his mind at the time. He must have grounded his decision upon a well defined exception to the rule, or upon the theory that the state court's decision violated a federal clause.

It may here be parenthetically remarked that Mr. Justice Miller's suggestion that the court were influenced in their decision, because they considered the state construction to be unsettled, will not bear examination. Mr. Justice Swayne, on page 205, says it is unnecessary to decide whether the construction was or was not settled, as the point was not material. It could not, therefore, have been the basis of the decision.

We return to the proposition just stated. The decision must have rested upon a federal question, or upon a well defined exception to the rule. Nowhere in the language of the court is there a suggestion of an exception to be engrafted upon the principle that the federal courts are bound to follow the construction of the state courts.

The first half of the opinion is devoted to a discussion of the legality of the state legislation. It has been suggested that the excitement and unrest, during the time of the Civil War, was largely responsible for the decision in this case. That it was a violent reaction from the doctrine of States' Rights which was at that time being pressed so disastrously by the states of the South. This may have been, to a great extent, true. This may have been the primary cause for the discussion of a clearly irrelevant question, in the early part of Mr. Justice Swayne's opinion. That it was irrelevant, and that Mr. Justice Swayne knew it was irrelevant, seems to be very clear. Perhaps he desired to administer a rebuke to the state for attempting to evade its obligations by a construction so palpably wrong as to be in conflict with the law of "sixteen other states," but that he intended to make that fact the ground of his decision, it is impossible to believe.

Mr. Justice Swayne, as we have pointed out, in a case just previous to *Gelpcke* v. *Dubuque*, clearly demonstrated his belief in the duty of the federal courts, as a matter of obligation, to follow the state courts in cases precisely similar to the one at bar. Is it conceivable that he had so soon forgotten the rule he there laid down, and now, as Professor Pepper says, "was assuming to administer not the law of Iowa, but the law of sixteen other states?" It cannot be denied that there is room for this criticism, because the opinion undoubtedly does remark upon the soundness of the former decisions, as contrasted with what is said to be the unsoundness of the latter. It is insisted, however, that this discussion was given merely for the purpose of exposing the intentions of the state, and not as a legal reason for the decision. A manifest error in paragraphing tends to substantiate the criticism. In the report on p. 206, Mr. Justice Swayne closes his remarks concerning the erroneous character of the late Iowa decision. His closing sentence is placed at the beginning of the following paragraph, which deals with the question of the *effect* to be given to the state decisions by the Supreme Court. The last sentence in the preceding paragraph is, "Many of the cases in the other states are marked by the profoundest legal ability." This should be followed directly by the opening sentence in the following paragraph: "The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety." The court then begins an entirely different subject, and the one which involves the real principle of the case. It is not surprising that the second sentence in this paragraph should have been thought to be a sequence of the first, quoted above, but the subject matter of the two being entirely different, and there being no connecting words, it seems clearly to be an error of the transcriber. The next paragraph, as it should be arranged, and which in our opinion embodies the real ground of the decision whether right or wrong, reads as follows: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and

true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, *or decision of its courts, altering the construction of the law.* The same rule applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

Whatever may be said of the ambiguity of some portions of Mr. Justice Swayne's opinion, certainly such a criticism cannot be applied to this paragraph. It is clear and emphatic. If the opinion had consisted of this alone, it would no doubt have received much less censure than it has.

Gelpcke v. *Dubuque* has been followed by a long line of cases in the Supreme Court. The principle uniformly adopted as the one there laid down, is that when a state court has altered the interpretation of a state statute, such decision amounts to an amendment of the statute, and is, within the meaning of the federal clause, a "law," which, when it impairs the obligation of contracts, must be deprived of its force by the federal courts.[1] This is so well known that we refrain from quoting from later cases. To recapitulate, the argument hitherto may de briefly summarized as follows :

[1] Thompson *v.* Lee Co., 3 Wall. 327 (1865), Davis, J.; Havemeyer *v.* Iowa Co., 3 Wall. 294 (1865), Swayne, J.; Lee Co. *v.* Rogers, 7 Wall. 181 (1868), Nelson, J.; Butz *v.* Muscatine, 8 Wall. 575 (1869), Swayne, J.; The City *v.* Lamson, 9 Wall. 477 (1869); Olcott *v.* Supervisors, 16 Wall. 678 (1872), Strong, J.; Township of Pine Grove *v.* Talcott, 19 Wall. 666 (1873), Swayne, J.; Boyd *v.* Ala., 94 U. S. 645 (1876); Town of S. Ottawa *v.* Perkins, 94 U. S. 261 (1876); Douglas *v.* Co. of Pike, 101 U. S. 677 (1879), Waite, J.; Anderson *v.* Santa Anna, 116 U. S. 356 (1885), Harlan, J.; County *v.* Douglas, 105 U. S. 728 (1881), Waite, C. J.; Green *v.* County of Conness, 109 U. S. 104, Bradley, J.; Louisiana *v.* Pilsbury, 105 U. S. 278 (1881), Field, J.; Ray *v.* Gas Co., 138 Pa. 391 (1890), Clark, J.; Union Bank *v.* Board, 90 Fed. 7 (1898); Louisville T. Co. *v.* Cincinnati, 76 Fed. 296 (1896); Loeb *v.* Trustees of Ham. Co., 91 Fed. 37 (1899).

(1) *The federal courts, when administering the law of the state, are as fully bound to accept the states' courts' construction of state statutes as they are to accept the statutes themselves.*

(2) *As there is no exception to the duty of the federal court to accept the state statutes, so there is no exception to the duty of the federal court to accept the states' courts' construction of those statutes, unless a federal question is involved. Both must stand or fall together, for the courts have declared them to be of equal rank.*

(3) *Mr. Justice Swayne was fully in accord with the rule as above given, as evidenced by his opinions both before and after Gelpcke v. Dubuque.*

(4) *Gelpcke v. Dubuque was decided on the ground that the Iowa decision altering the construction of the staute was, within the meaning of the federal clause, a "law," which impaired the obligation of contracts, and which the federal courts might refuse to apply for that reason.*

Section III.—THE DISSENTING OPINION OF MR. JUSTICE MILLER.

Having reached the conclusion as to the basis of the decision in *Gelpcke* v. *Dubuque*, it remains to examine the correctness of that principle. Before taking up that phase of the subject, it may not be inappropriate to briefly refer, at this point, to some of the objections which have been raised to the decision. For the purposes of this paper, we may roughly divide all these objections into two classes:

(1.) Objections to the statement that a judicial decision may be a "law," when it construes a state statute.

(2.) Objections which have been raised to any other theory of the case, among which are the "exception" and "bias" theory.

If the argument heretofore is able to stand the test of investigation, we may disregard the second class of objections, because we have shown that the case was not decided on any of those principles. This paper would be incomplete, however, and its conclusions not well established, did we not give some space to a more careful examination of that which is the

ground-work of nearly all later argument against the principle of this case, the famous dissenting opinion of Mr. Justice Miller.

Mr. Justice Miller's argument seems to assume that the court had recognized an exception to the rule that the federal courts must adopt the state courts' construction of their own laws. Most of his criticism, therefore, is levied at the "exception" theory. In all of that criticism we fully concur, because, as we have tried to show, there can be no exception to the rule. It must stand or fall in its entirety. That Mr. Justice Miller did not consider the case to be founded upon a constitutional question would appear from the nature of his criticism, but nevertheless, that he did recognize to some extent, at least, this view of the case, unmistakably appears from a careful perusal of his opinion, as we shall try to show later.

He points out that the majority of the court do not controvert the principle "that to the highest court of the state belongs the right to construe its statutes and its constitution, *except where they may conflict with the Constitution of the United States, or some treaty or statute made under it.*" After having made this clear statement, he proceeds to prove it by quoting from former opinions of the justices who composed the majority. Then, in the next breath, he declares that the majority do controvert the principle which he has just said they do not. It will be noted that the only exception which Mr. Justice Miller declares the majority recognize, is where the statute or constitution of the state violates the federal constitution. In the following paragraph he says: "But while admitting the general principle, the court say it is inapplicable because there have been conflicting decisions" in the state. This is the first reason which he conceives the majority gave. That this is an incorrect statement of the majority's conclusion appears by this language taken from Mr. Justice Swayne's opinion, page 205: "Whether the judgment in question can, under the circumstances, be deemed to come within that category ('the latest settled adjudications') it is not now necessary to determine."

In the same paragraph (p. 210) Mr. Justice Miller gives

what he thinks was the second reason that induced the majority to decide as they did. He speaks of the "moral force" of the proposition, and continues, "And I think, taken in connection with some *fancied duty of this court to enforce contracts* over and beyond that appertaining to other courts, has given the majority a leaning towards the adoption of a rule, which in my opinion cannot be justified either on principle or authority." What that principle is, Mr. Justice Miller nowhere in his opinion states more definitely than here. But whatever he conceived it to be, it must have been an "exception," other than the only one which, he had just carefully proven, the majority entertained, if we concede that he did not recognize a federal question to be the basis of the decision.

That these vague reasons form a very unsatisfactory explanation of the court's decision must be apparent to every one It seems little short of a contradiction for the eminent dissenting justice to say that no exception save where a federal question was involved was recognized, and immediately to give as the basis of the decision of that court, a very indefinite reason for granting an exception other than that one.

He also seems inconsistent in another part of his opinion. On pages 208–209 he says, "Yet this is in substance what the majority of the court have decided. They have said to the Federal Court sitting in Iowa, 'You shall disregard this decision of the highest court of the state on this question. Although you are sitting in the State of Iowa and administering her laws, and construing her constitution, you shall not follow the latest, though it be the soundest, exposition of its constitution by the Supreme Court of that state, but you shall decide directly to the contrary, and where that court has said that a statute is unconstitutional, you shall say that it is constitutional. Where it says bonds are void, issued in the state, because they violate its constitution, you shall say that they are valid, because they do not violate its constitution." It is submitted that nothing can be further from what the court actually did say than the foregoing. According to this language, which is unlimited, the federal court claimed the right to construe the constitution and statutes of the state whenever

it should choose to do so. The court distinctly disclaimed such a right, as Mr. Justice Miller, himself, had previously pointed out. What the court did do, and all that they did do, was to step in and protect the bonds held by the plaintiff. To do this it was not necessary to arrogate to themselves the right to dictate to the state what her laws should be; all they said was, "*you shall not in this case apply a statute or a construction of a statute which impairs the obligation of this contract.*" The court distinctly say, "However we may regard the late case in Iowa as affecting the future, etc., etc.," thus plainly intimating their inability to interfere in any way with the rights of the state court.

That Mr. Justice Miller really recognized the truth of these observations, appears from a sentence from his opinion, on page 216: "In the present case, the court rests on the former decision of the state court, *declining to examine the constitutional question for itself.*" How does this sentence comport with the one quoted above, where he declared that the court by its decision had given the federal court sitting in Iowa the right to decide that bonds were valid "because the state statute was constitutional," that is because the federal court thought, contrary to the state court, that it was constitutional? It is one thing to claim a right to interpret a law for a sovereign state, and to force that law upon that state, a thing which, as Mr. Justice Miller points out, cannot be done; it is quite a different thing to say to the state court, "Construe your statutes as you will, and as is your undoubted right, but when you attempt to *apply* that construction, so that it impairs the obligation of contracts, we, by virtue of the federal constitution, claim the right to forbid you."

That Mr. Justice Miller really knew this to be the attitude of the court, is apparent from the fact that while mainly combatting what he thought to be the necessary principle of the decision, the "exception" theory, yet at the same time he advances at least two arguments against the "federal" theory.

On pages 210–11 he declares that there can be no question of the impairment of the obligation of contracts, because here the court is called upon "to determine whether there ever

was a contract made in the case," not to enforce a contract whose existence was undisputed. This objection will not bear investigation. It assumes that the Iowa decision had a retroactive effect, which is the very point at issue.

The next objection which, without naming it, Mr. Justice Miller raises to the "federal" theory of *Gelpcke* v. *Dubuque*, is that a judicial decision cannot be a law; thus, on page 211, he says, "The decision of this court contravenes this principle (*i. e.*, that courts only interpret the law) and holds that the decision of the court makes the law, and in fact the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid." This last sentence is plainly inconsistent with the sentence of Mr. Justice Miller above quoted, where he declared in general terms that the federal courts claimed the right to construe the Iowa statutes. Here he recognizes the scope of the decision to be limited to the protection of this contract, by virtue of the fact that it had been entered into before the decision of the Iowa court, which by applying a changed construction of the statute, impaired its obligation.

By the objection last referred to, Mr. Justice Miller has touched the principle upon which *Gelpcke* v. *Dubuque* must stand or fall. It is not proposed to discuss it here. His language is quoted to show that he, too, recognized the ground of the decision to be that, in the opinion of the court, a judicial decision can be a "law" within the meaning of the federal clause, when it enters into and becomes part of a statute. Mr. Justice Miller, however, persistently refused to recognize in terms that the court decided the case on this theory. The entire tenor of the court's opinion was distasteful to him, as he very plainly shows by his language, and as the thought that the federal courts could usurp state rights affected him most strongly, he dealt mainly with that view. Almost at the end of his opinion he says, "I think I have sustained by this examination of the cases, the assertion made in the commencement of this opinion, that the court has, in this case, taken a

step in advance of anything heretofore decided by it on this subject. That advance is in the direction of a usurpation of the right which belongs to the state courts, to decide as a finality upon the construction of state constitutions and state statutes. *This invasion is made in a case where there is no pretense that the constitution, as thus construed, is any infraction of the laws or Constitution of the United States.*" Side by side with this last sentence we will place, at the risk of repetition, a sentence from the opinion in which Mr. Justice Miller says there is no "pretense" that a federal clause had been encroached upon: "The sound and true rule is, that if the contract when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of legislation, or decision of its courts altering the construction of the law. The same principle applies where there is a change of judicial decision, as to the constitutional power of the legislature to enact the law. To this rule thus enlarged we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case."

On the whole, Mr. Justice Miller's dissenting opinion leaves much to be desired. He does not plainly state what he considers to be the basis of the decision, but contents himself with a vigorous if not entirely connected dissent to the whole opinion. The chief source of dissatisfaction, however, lies in the fact that he attacks not the principle upon which the court actually based its opinion, so much as he attacks another principle which he thinks must have been the basis of the decision, but which, it is submitted, was not and could not have been.

If the contention as to what the underlying principle of the case is has been established, then Mr. Justice Miller's opinion is not pertinent except in so far as it deals with the question of judicial legislation.

SECTION IV.—EXAMINATION OF AUTHORITIES FOR THE PRINCIPLE INVOLVED.

In the discussion of the correctness or incorrectness of the principle, which we have shown to be the foundation of *Gelpcke* v. *Dubuque*, we propose to proceed first, by examining the authorities, and secondly, by an investigation on *a priori* grounds.

Before beginning an examination of the cases, let it be remembered that this paper deals not so much with the question of the soundness or unsoundness of *Gelpcke* v. *Dubuque* as viewed in the light of the decided cases of that day, as with the recent criticism of the position there assumed. We therefore claim the right to examine all cases bearing on the subject, even *Gelpcke* v. *Dubuque* itself and kindred cases, in order to throw light upon the attitude which the courts have taken.

In the first place, the courts have declared that

A. The judicial construction of a state statute becomes a part of the statute, as much so as if incorporated into the text.

This expression has been so often used by the courts that it scarcely needs to be supported by decisions. It has been assumed by some text writers and by some judges that the courts do not mean what they say by this statement. It is said that to give it a literal meaning, would be to give to a decision the force of a law. Feeling fearful of the consequences, should such a conclusion be established, the writers and judges were driven to the result just mentioned, *i. e.*, to say that when the courts have plainly said one thing, they mean something else. Whether the consequences of adopting the heretical doctrine that a judicial decision may be a law, would be so appalling as is feared by some eminent authorities, we shall not discuss at this point. The task now before us is to prove that the courts have laid down the rule as stated.

We have already proven that the federal courts are bound to follow the construction of the state courts in cases involving statute law. We have also shown that they receive the con-

struction as a part of the statute. All that is necessary at this point is to refer again to the language used in some of those cases, with the idea of emphasizing the thought, that the construction does actually become a part of the statute law.

In *Elmendorf* v. *Taylor*,[1] Mr. Chief Justice Marshall says, "We receive the construction given by the courts of the nation (*i. e.*, the state courts) as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute." Here he plainly intimates his belief that the statutes and the construction are equally binding.

In *Green* v. *Neil's Lessee*,[2] Mr. Justice McLean said, in the course of his opinion, "If the construction of the highest judicial tribunal of the state *form a part of its statute law as much as an enactment of the legislature, how can this court make a distinction between them?*"

In *Shelby* v. *Guy*,[3] Mr. Justice Johnson uses the following language: "Nor is it questionable, that a fixed and received construction of their respective statute laws in their own courts, *makes in fact a part of the statute law of the country*, however we may doubt the propriety of that construction."

In *Christy* v. *Pridgeon*,[4] Mr. Justice Field says, "If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretation, so far as it is a rule for our action, *a different law in one state from what it is in another.*" That is, the action of the court changes the law since both acts are identical in language.

In *Leffingwell* v. *Warren*,[5] Mr. Justice Swayne says, "The construction given to a statute of a state by the highest judicial tribunal of such state, *is regarded as a part of such statute*, and is as binding upon the courts of the United States as the text."

In *Walker* v. *State Harbor Commissioners*,[6] the court say,

[1] *Supra*, p. 7.
[2] *Supra*, p. 9.
[3] 11 Wheat. 361 (1826).
[4] 4 Wall, 196 (1866), Field, J.
[5] *Supra*, p. 24.
[6] 17 Wall, 648 (1873).

referring to a state court's construction: "Whatever may be our opinion as to its original soundness its interpretation is accepted and *it becomes a part of the statute as much as if incorporated into the body of it.*"

In *Webster* v. *Cooper*,[1] the court, referring to the construction of the Constitution of Maine by its State Supreme Court, say, "*this court receives such a settled construction as part of the fundamental law of the state.*"

These carefully worded expressions of the courts, if they mean anything at all, must mean that the judicial construction of state statutes is in fact a part of the law of the state. But while not expressly contradicting the principles as here laid down, the courts have, in certain classes of cases, been accustomed to ignore them. It is submitted that if this view as expressed so insistently by the courts be correct, then in later decisions they have no right to disregard it. If this view of the *status* of judicial construction be unsound, then the courts should have the courage to say so and put an end to the controversy at once.

Having satisfied ourselves that the courts have laid down the rule as above stated, we will now proceed to examine cases where

B. The courts have, in fact, treated the judicial interpretation of state statutes by state courts, as being the law, not merely the interpretation of the law.

The best known group of cases which support the statement just given, is, obviously, that class of which *Gelpcke* v. *Dubuque* is the type. As these cases are all very similar in the facts involved, a few general observations may be made which will apply equally to all. In the first place they are all cases which originated in the circuit courts, jurisdiction being obtained by virtue of diverse citizenship. In the second place, in each of this line of cases, a statute previously adjudged valid by a state supreme court had been held void by the same tribunal. This question was squarely in issue. Can rights be

[1] 14 How. 488 (1852).

acquired under a statute afterwards declared to be void? The courts uniformly answered the question in the affirmative provided a state court had previously held the act valid. They also said, that when those rights thus acquired, were contract rights, the federal courts would protect them by virtue of the clause in the Constitution of the United States, forbidding a state to pass a law, impairing the obligation of contracts.

One of the earliest cases to follow *Gelpcke* v. *Dubuque* was *Havemeyer* v. *Iowa Co.*[1] That case came before the Circuit Court of the United States for the District of Wisconsin, and the court being divided, was brought to the Supreme Court of the United States under the Act of Congress of April 29, 1802. The legislature of Wisconsin passed an act authorizing counties to issue bonds. The executive department classified the act as a local act, which took effect from the date of its passage. This view was affirmed by the Supreme Court of Wisconsin. By later decisions the Supreme Court of Wisconsin decided that this act was general in nature, was not effective until published, and that the bonds in question which had been issued before publication, were void. The Supreme Court of the United States, following and approving *Gelpcke* v. *Dubuque*, declared that the obligation of the contract should be protected, although the Supreme Court of Wisconsin could construe their laws as they pleased. The court unanimously speaking through Mr. Justice Swayne, say these decisions "being long posterior to the time when the securities were issued, they can have no effect on our decision and may be laid out of view. We can look only to the condition of things when they were sold. That brings them within the rule laid down by this court, in *Gelpcke* v. *City of Dubuque*. In that case it was held, that if the contract, when made, was valid by the constitution and laws of the state, as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the legislature or judiciary can impair its obligation. This rule was established upon the most careful consideration. We

[1] 3 Wall, 294 (1865), Swayne, J.

think it rests upon a solid foundation, and we feel no disposition to depart from it."

Two more cases very similar both in facts and decision followed *Havemeyer* v. *Iowa Co.* during the next three years: *Thompson* v. *Lee Co.*,[1] and *Lee Co.* v. *Rogers*.[2] Mr. Justice Davis delivered the opinion in the former and Mr. Justice Nelson in the latter, with no dissent in either case.

Shortly after this came the unfortunate decision in *Butz* v. *City of Muscatine*.[3] In this case an act had been passed by the legislature of Iowa authorizing the issuance of certain bonds. Before any judicial decision as to the validity of the statute, as far as appeared, the bonds in question were issued. A subsequent decision of the Supreme Court of Iowa declared the act unconstitutional. The court refused to follow the state decision, alleging that its effect was to impair the obligation of the contract. Mr. Justice Miller dissented, making use of very strong language not unmixed with sarcastic allusions to the opinion of the majority. The Chief Justice concurred in the dissent. Whether or not the other cases discussed are sound on principle, it is submitted that this decision went beyond the bounds of authority. We have examined, as we believe, most of the leading cases on this subject, and, so far as we are able to judge, no other case has taken the position taken by Mr. Justice Swayne and the majority of the court in this case. *Gelpcke* v. *Dubuque* and the line of cases following it, decide only this: That whenever a Supreme Court of a state has adopted a construction for a particular local law, such construction becomes part of the local law. The court then by changing its view, practically amends the law. Such an amendment can no more have a retroactive effect than can an amendment passed by the legislature. This limitation does not, in either case, affect the amendment as to the future. Similarly, the bankrupt laws were held valid as to the future, but not in their application to existing contracts. The court recognizes the right and the

[1] 3 Wall, 327 (1865), Davis, J.
[2] 7 Wall, 181 (1868), Nelson, J.
[3] 8 Wall, 575 (1869), Swayne, J.

duty of the state court to change its ruling, if necessary; it merely protects existing contracts.

This is very far from saying, that one who relies on his own construction of a statute, will be protected against the consequences of his own error.

Until the state court has once acted, there can be no impairment by construction. When the law is passed, contract rights acquired under it are protected from legislative repeal. When a construction of a statute has once been made, contracts made on the faith of it are similarly protected from judicial action. That is the limitation of the doctrine.

May it not be supposed that Mr. Justice Swayne leaned in this case too far one way, perhaps to counterbalance Mr. Justice Miller, who by the vigor of his language in the dissenting opinion, conveys to us the unavoidable impression that a discussion of some warmth had been precipitated. But however that may have been, we submit with great deference that this decision stands absolutely alone, and cannot be supported, either by reason or authority.

In *Township of Pine Grove* v. *Talcott*,[1] the facts were similar to *Gelpcke* v. *Dubuque*. Mr. Justice Swayne, in delivering the opinion, again suffers himself to discuss the question as to the constitutionality of the state statute. He carefully goes over the question as to its validity or invalidity. It is submitted that the court had no right whatever to consider this question. It would be absurd as well as intolerable to imagine for one moment that the federal court could force a state to adopt for the future a different construction from that which its courts had settled upon. The argument, that the states should be prevented from putting a palpably wrong construction upon their statutes, cannot be supported. The obligations of a state are binding only upon its conscience.[2] To say that the federal court has the right to force the state to adopt a "reasonable construction" of a law, when there is no power to prevent it from repudiating its obligations absolutely, is plainly untenable. As in *Gelpcke* v. *Dubuque*, near the end of his opinion, Mr.

[1] 19 Wall, 666 (1873), Swayne, J.

[2] Hare on Constitutional Law, Lecture XXXII.

Justice Swayne gives expression to the real ground of the decision. He says, "The national Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly before us, that end can be accomplished unwarrantably, no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

Douglas v. *County of Pike*[1] contains one of the clearest statements of this view that has been written. This case came up on a writ of error to the Circuit Court of the United States for the Eastern District of Missouri. It was an action on three hundred and twenty-one coupons, detached from bonds issued by the County of Pike, Missouri. The county had been authorized, by an act of the legislature, to issue the bonds in question. This act had been repeatedly construed to be constitutional, by the highest court of the state. Long after the issuance of the bonds, another decision of the Supreme Court of Missouri held the act to be unconstitutional. Mr. Chief Justice Waite uses the following language: "The true rule is to give a change of judicial construction in respect to a statute, the same effect in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, make it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is, to all intents and purposes, *the same in its effect on contracts as an amendment of the law by means of a legislative enactment.* So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to

[1] 101 U. S. 677 (1879), Waite, C. J.

the law as it was judicially construed to be, when the bonds in question were put upon the market as commercial paper. We recognize fully, not only the right of a state court, but its duty, to change its decisions whenever in its judgment the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones, and ordinarily we will follow them, except so far as they affect rights vested before the change was made. . . . If the township aid act had not been repealed by the new constitution of 1875, which took away from all municipalities the power of subscribing to the stock of railroads, the new decisions would be binding in respect to all issues of bonds after they were made; *but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing.*" Unlike the opinions of Mr. Justice Swayne in similar cases, there is here no ambiguity as to the ground of the decision. In *Anderson* v. *Santa Anna*,[1] Mr. Justice Harlan quotes the above language of Mr. Chief Justice Waite with approval and emphatically reasserts the same doctrine.

Louisiana v. *Pilsbury*[2] came up by a writ of error to the Supreme Court of the State of Louisiana. The case came up under the 25th section of the judiciary act; the facts involved a repudiation of bonded obligations by the City of New Orleans. This had been brought about by means both of a change of construction of existing statutes, and by a later act passed by the legislature of the State of Louisiana, and which was upheld by the decision reviewed. The doctrine that states are prohibited by the federal clause from impairing the obligation of contracts by state decisions, as well as by state statutes, was carefully considered. Mr. Justice Field with no dissent delivered the opinion of the court. Beginning on page 294, the court say, "The exposition given by the highest tribunal of a state must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering

[1] 116 U. S. 356 (1885), Harlan, J.
[2] 105 U. S. 278 (1881), Field, J.

the construction. This doctrine applies as well to the construction of a provision of the organic law, as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it."

The discussion of this line of cases would be incomplete did we not include the Pennsylvania case of *Ray* v. *The Gas Co.*,[1] decided in 1890. In this case the plaintiff in error claimed that a contract, which he had entered into, would be impaired were the Supreme Court of Pennsylvania to follow its own ruling on a question of general law and adjudge his contract void. He based his contention upon the fact that previous decisions of the Supreme Court of Pennsylvania had taken a different view of the law, and that he had contracted on the faith of such ruling. The court refused to adopt his view. They admitted the justice of his contention in all cases where such change of decision had been a change in the construction of a statute, but denied its application in the present case, because no question of the construction of a statute was involved.

The opinion clearly points out the two classes of cases and the distinction between them. The opinion of the court was delivered by Mr. Justice Clark with no dissent. On page 590 he says, "The courts of highest authority of all the states and of the United states are not infrequently called upon to change their rulings upon questions of highest importance. In so doing, the doctrine is not that the law is changed, but that the court was mistaken in its former decision, and that the law is, and really always was, as it is expounded in the later decision upon the subject. The members of the judiciary can in no sense be said to make or change the law; they

[1] 138 Pa. 591 (1890), Clark, J.

simply expound it and apply it to individual cases. *To this general doctrine there is one well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute, as the text itself, and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment.'*"

The court then cites with approval *Douglas* v. *Co. of Pike*, *Anderson* v. *Santa Anna*, *Gelpcke* v. *Dubuque*, etc., and quoting at length from the opinion in *Ohio Trust Co.* v. *Debolt*, thus sums up the law: "This ruling applies, it will be observed, not to the general law, common to all the states, but to the laws of the state 'as expounded by all the departments of its government,' and it is held that contracts valid by these laws may not be impaired 'either by subsequent legislation or by the decisions of its courts altering their construction. The reference is, of course, to the statute law.'" In addition a few cases which lay down the same principle are cited in the note.[1]

In connection with this phase of the subject, it is thought profitable to refer to another class of decisions quite similar to the one just discussed. Reference is here made to that large body of cases, where the act of the state embodies a contract made between the state and an individual. To take a typical case. The legislature of the state passes a law which confers contract rights upon an individual or upon a class of individuals. The terms of the act are complied with by these individuals, who thereby enter into a contract with the state. The state then passes another act which impairs the obliga-

[1] The City *v.* Lamson, 9 Wall, 477 (1869); County of Leavenworth *v.* Barnes, 94 U. S. 70 (1876); Boyd *v.* Alabama, 94 U. S. 645 (1876); Town of S. Ottawa *v.* Perkins, 94 U. S. 261 (1876); County *v.* Douglas, 105 U. S. 728 (1881), Waite, C. J.; Green *v.* County of Conness, 109 U. S. 104, Bradley, J.; Taylor *v.* Ypsilanti, 105 U. S. 60 (1881), Harlan, J.; Union Bank *v.* Board, 90 Fed. 7 (1898); Louisville T. Co. *v.* Cincinnati, 76 Fed. 296 (1896); Loeb *v.* Trustees, 91 Fed. 37 (1899); Wilson *v.* Perrin, 11 C. C. A. 66 and note (1894), Lurton, J.; Hill *v.* Hite, 29 C. C. A. 549 and note (1898), Phillips, J.

tion of the contract. The State Supreme Court upholds the latter act on the ground that the former act conferred no contract rights, and since there was no contract, there could be no impairment. In such cases the Supreme Court of the United States claims the right to investigate for itself and determine whether in fact a contract exists, and then to protect the obligation of that contract from impairment. These cases are sometimes referred to as laying down the principle that the federal courts have the right to construe the state law whenever that law embodies in its terms a contract. This we believe to be too broad. In such cases the court claims the right to determine for itself whether *a contract exists;* but it does not have the right to decide as to the validity or invalidity of the act. It is submitted that while embodied in the same language, the act and the contract which it creates, are two different things. The act cannot of itself be a contract. Acceptance of its terms by those to whom the offer is made is a condition precedent. The contract is a *relation* between the state and the individual. That relation the court may investigate. To hold otherwise would be to deprive the federal courts of their appellate power; for what would be easier for the state court than to declare in every instance that the contract itself being void, there could be no impairment. The federal courts, having acquired jurisdiction, always have the right to determine whether a contract in fact exists, and then to protect that contract from an impairment of its obligation; they necessarily have this power as an appropriate and necessary means of enforcing the constitutional prohibition, with which duty they are intrusted. But at the same time the question as to the constitutionality of the act upon which the contract is based, is a question into which the federal courts cannot inquire. The question of the power of the legislature to pass the act is one thing; the question as to whether it actually confers contract rights is another. It is obvious that on principle this conclusion must be reached, for how can the subject matter of an act affect the power, or rather the lack of power, of the federal courts to construe it? We have shown that the power does not exist. An incident

of the subject matter of the act cannot confer it. It is believed that the cases will bear out this distinction, and it is earnestly insisted that on principle no other conclusion can be supported.

The earliest leading case of this class is *State Bank of Ohio* v. *Knoop*.[1] Ohio passed an act in 1845, by which it was provided for the organization of state banks. Among other privileges, it was provided that such banks should be allowed to pay the state six per cent. of their net profits, in lieu of taxes. "This compact was accepted, and on the faith of it fifty banks were organized, which are still in operation. Up to the year 1837, I believe, the banks, the profession and the bench, considered this as a contract and binding upon the state and upon the banks. For more than thirty-five years this mode of taxing the dividends of banks had been sanctioned in the State of Ohio." In 1851 an act was passed, providing for the taxation of these banks. The state bank of Ohio resisted payment on the ground that the later act was unconstitutional, because it impaired the obligation of its contract. The Ohio Supreme Court decided that the former act did not create contract rights, and on that ground upheld the later act. The question of the construction of the later act was in no way involved. Before we attempt to interpret the court's language, let us note exactly what questions were before it. In the first place, as we have seen, an act had been passed which offered certain immunities to state banks. The state court decided two questions:

(1) That under the constitution of Ohio, the general assembly had no power to pass such an act.

(2) That even if the act were valid, no contract rights were created by the particular relation here established between the state and the bank.

On these two grounds, either of which was sufficient, the state court held that there could be no impairment, since there was no contract.[2]

As we have pointed out, the Supreme Court of the United States has no right to consider the first question; the state

[1] 16 How. 391 (1853), McLean, J.

[2] Debolt *v.* Ohio Life & Trust Co., 1 Ohio, 564.

court's judgment as to the validity of the state's own law, in reference to the state constitution, is conclusive. That the Supreme Court could investigate the second question, there can be no doubt. But it is plain that to reach the conclusion which they did, the Supreme Court must have decided

(1) That the law of 1845, as far as this contract, at least, is concerned, was a valid law.

(2) That a binding contract was created between the state and the bank.

That the court had the power to decide the second point is conceded. That they had not the power to decide the first question in the abstract is emphatically asserted. That in this case they had the right and the duty laid upon them to protect this contract, if one existed, is believed to be correct, but the only legitimate manner in which to do this, was to prevent the state court *in this case* from applying a later construction, when the contract had been entered into upon the faith of a former construction. The question then arises, had the state court of Ohio formerly held this act valid, now construed by it to be void. We gain little or no enlightenment upon this point by an examination of the opinions in *Debolt* v. *The Insurance Co.*,[1] but from the language of Mr. Chief Justice Taney in the same case when it came before the Supreme Court of the United States, we should infer that the state court had formerly construed the act to be a valid exercise of constitutional power.[2] The same thought is conveyed by Mr. Justice McLean in the sentence quoted above, when he declares that "for more than thirty-five years this mode of taxing had been sanctioned in the State of Ohio, by the profession, the banks and the bench."

On the principle that a state construction of a state statute, or constitution, becomes a part of the law, and contract rights acquired under it cannot thereafter be divested, we can support the conclusion in this case. That Mr. Chief Justice Taney did support the case on that ground, is evident from

[1] *Supra*, p. 45.

[2] See opinion of Taney, C. J., Grier with him, Ohio Life Ins. & Trust Co. *v.* Debolt, 16 How. at p. 431.

an examination of his opinion; but Mr. Justice McLean, who delivered the opinion of the court, did not consider this point in terms. Indeed, his remarks upon the question we are discussing do not seem entirely clear. On page 390 he says, "The rule observed by this court to follow the construction of the statute of the state by its Supreme Court, is strongly urged. This is done when we are required to administer the laws of the state. The established construction of a statute of the state is received as a part of the statute. But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the Supreme Court of the state is before us for revision, and if their construction of the contract in question impairs its obligation, we are required to reverse their judgment."

It will be noted here that the eminent justice declares that, in ordinary cases, the "established construction of a statute of the state is received as a part of the statute." The only construction of the state court which was under consideration, was their construction of the law of 1845. Mr. Justice McLean then continues, "But we are called in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union." What law does he refer to in this sentence? He cannot mean the law of 1851, because there was no question as to its construction before the court, and no one had thought of urging that its construction by the state court should be followed, for, as a matter of fact, the state court had not construed it. He cannot mean the law of 1845, because it could not impair a contract entered into after its passage. If the rest of his opinion were at all consistent with this view, we should say that he must have referred by "law" to the *later construction* of the act of 1845, for that was what, in reality, did impair the obligation of the contract. Indeed, by the following sentence, he declares this to be the fact: "The decision of the Supreme Court of the state is before us for revision, and if *their construction of the contract in question* impairs

its obligation, we are required to reverse their judgment." He says in one sentence, "we are testing the validity of a law;" in the next he says, "we are judging the validity of a construction of a contract." The conclusion seems clear that he considered the "construction" to be the "law."

It is submitted that by "construction of the contract" here, is really meant the construction of the act of 1845. The learned justice does not seem to distinguish the two, and from the context we must infer that such was his meaning. Moreover, in no sense can a construction of a contract be said to impair its obligation. If this were conceded, every time a court adjudged a contract void it would impair its obligation. But this is not impairment. In such a case one merely enters into a relation, which he conceives to be a contract, but in which conception he has fallen into error. Mr. Cooley, in his work on Constitutional Law,[1] says, "no promise or assurance can, therefore, constitute a contract, unless the law lends its sanction." It follows that there can be no impairment of the obligation of the contract, unless there has been a change in the law. In all other cases it is merely a mistaken conception as to what the law is.

We are able to place upon these words of Mr. Justice McLean no construction except this: that the reinterpretation of the act of 1845, by the state court, was a law impairing the obligation of the contract, and it was for that reason that the Supreme Court refused to follow the state decision, which applied that reinterpretation to the case before it.

But however this may have been, there is no question of the attitude of some of the other justices. Mr. Chief Justice Taney, concurring, announces that his opinion is embodied in his opinion delivered in *Ohio Insurance Co.* v. *Debolt*,[2] in which case, as we will show later, he distinctly places his concurrence on the principle we have suggested.

Mr. Justice Catron, dissenting, clearly recognizes the act of 1845, and the contract created under it, to be two separate

[1] P. 313.

[2] *Supra*, p. 46.

and distinct things. He adopts the opinion of Mr. Justice Campbell, that *there was, in fact, no contract.* He then goes on to discuss the question of the power of the state to pass exemption laws, and then says: "General principles, however, have little application to the real question before us, which is this: Has the constitution of Ohio withheld from the legislature the authority to grant by contract with individuals the sovereign power, and are we bound to hold her constitution to mean, as her Supreme Court has construed it to mean? If the decisions in Ohio have settled the question in the affirmative, that the sovereign political power is not the subject of an irrepealable contract, then few will be so bold as to deny that it is our duty to conform to the construction they have settled; and the only objection to conformity, that I suppose could exist with any one is, that the construction is not settled." He then shows the construction to be settled, declares it to be his belief that the law is invalid, and that no contract rights were created even it were valid, and thus concludes: "But if I am mistaken in both these conclusions, then, I am of opinion, that by the express provisions of the constitution of Ohio, of 1802, the legislature of that state had withheld from its powers the authority to tie up the hands of subsequent legislatures in the exercise of the powers of taxation, and this opinion rests on judicial authority that this court is bound to follow; the Supreme Court of Ohio having held, by various solemn and unanimous decisions, that the political power of taxation was one of those reserved rights intended to be delegated by the people to each successive legislature, and to be exercised alike by every legislature according to the instructions of the people. . . . Whether this construction given to the state constitution is the proper one, is not a subject of inquiry in this court; it belongs exclusively to the state courts, and can no more be questioned by us, than state courts and judges can question our construction of the Constitution of the United States."

This opinion is quoted somewhat at length to show that Mr. Justice Catron draws the distinction contended for. He does not deny the power of the Supreme Court to interpret

the contract for itself. He does deny its power to decide as to the validity of the act.

Mr. Justice Daniel concurs with Campbell, who dissents on the ground that there was no contract created by the acceptance of the terms of the act by the bank.

In *Ohio Life Insurance and Trust Co.* v. *Debolt*,[1] Mr. Chief Justice Taney uses the following language (the facts were as to this point identical with *Bank* v. *Knoop*): "This brings me to the question more immediately before the court: Did the constitution of Ohio authorize its legislature, by contract, to exempt this company from its equal share of the public burdens, during the continuance of its charter? The Supreme Court of Ohio in the case before us decided that it did not. But this charter was granted while the constitution of 1802 was in force, and it is evident that this decision is in conflict with the uniform construction of that constitution during the whole period of its existence. It appears from the acts of the legislature, that the power was repeatedly exercised, while that constitution was in force, and acquiesced in by the people of the state. It was directly and distinctly sanctioned, by the Supreme Court of the state, in the case of the *State* v. *The Commercial Bank of Cincinnati*, 7 Ohio, 125.

"And when the constitution of a state, for nearly half a century, has received one uniform and unquestioned construction by all the departments of the government, legislative, executive and judicial, I think it must be regarded as the true one. It is true that this court always follows the decisions of the state courts in the construction of their own constitutions and laws. But where those decisions are in conflict, this court must determine between them. And certainly a construction acted on as undisputed for nearly fifty years by every department of the government, and supported by judicial decision, ought to be sufficient to give to the instrument a fixed and definite meaning. Contracts with the state authorities were made under it. And upon a question as to the validity of such a contract, the court, upon the soundest prin-

[1] *Supra*, p. 46.

ciples of justice, *is bound to adopt the construction it received from the state at the time the contract was made.*" The Chief Justice then refers to the case of *Rowan* v. *Runnels*, points out that the principles are the same whether jurisdiction is acquired by virtue of diverse citizenship or by virtue of the subject matter, and continues, "Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow those changes in judicial decisions, which the lapse of time and the change in judicial officers will often produce. The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, *or decisions of its courts altering the construction of the law.*"

Having thus dealt with the argument that the court must accept the state court's judgment as to the unconstitutionality af the statute, Mr. Chief Justice Taney takes up the question of whether, in fact, a contract had been created. He first declares the right of the Supreme Court to examine "the instrument claimed to be a contract," saying, "I proceed, therefore, to examine whether there *is any contract* in the acts of the legislature relied on by the plaintiff in error, which deprives the state of the power of levying upon the stock and property of the company its equal share of the taxes deemed necessary for the support of the government," and after a careful and exhaustive opinion, announces his conclusion that no contract existed, and, on that ground, affirms the judgment.

In this opinion Grier concurs on all points. Catron concurs in the conclusion that no contract had been created; does not dissent from the doctrine that the early interpretation of the act must be followed in cases where the state court has

changed its view, but expresses his opinion that the Ohio courts had not previously passed upon the constitutionality of the act.

Justices Daniel and Campbell also concur, while Justices McLean, Wayne, Curtis and Nelson dissent, but none of them attack the principle that the state court must be prevented from impairing the obligation of contracts by changing the interpretation of state statutes.

In interpreting the language of Mr. Chief Justice Taney, where he says the construction so long concurred in must be accepted as the true one, we must remember that the constitution of 1802 was no longer in force, and that no question could arise as to future construction. The later decision could operate only retroactively, if at all. This gives his statement its true significance, while otherwise it would appear too broad.

These two decisions have been examined somewhat at length, in order that there may be no misunderstanding in the further investigation of this line of cases, as to the points they involve. *Bank* v. *Knoop* and *Insurance Co.* v. *Debolt* are authority for the following principles of law:

(1) *When a state legislature passes an act purporting to contain a contract, there are two separate and distinct problems presented.*

(a) *Is the act constitutional?*

(b) *Has a contract been created?*

(2) *The United States Court have the right to examine for themselves whether or not a contract has been created.*

(3) *The United States Court have not the right to examine the interpretation by the state court of the constitutionality* (*state*) *of the act, but must accept it as final.*

(4) *The United States Court* (*having acquired jurisdiction by virtue of the fact that a later act has been passed which would impair the obligation of contracts if there were any*), *may refuse to apply a decision of a state court, adjudging an act void, in a case where contract rights have been acquired under a former construction by that court, adjudging it valid.*

The last principle, it will be noted, differs only from the conclusions drawn from the class of cases represented by

Gelpcke v. *Dubuque*, in that in the one case jurisdiction is acquired by virtue of diverse citizenship, in the other, by virtue of the subject matter. The principle, obviously, is the same in each case. In *Farmers' and Mechanics' Bank of Pa.* v. *Smith*,[1] Mr. Chief Justice Marshall made the following very pointed statement, "that this case was not distinguishable from the former decisions of the court on the same point, except by the circumstance that the defendant, in the present case, was a citizen of the same state as the plaintiff, at the time the contract was made in that state, and remained such at the time the suit was commenced in its courts. But these facts made no difference in this case. The Constitution of the United States was made for the whole people of the Union, and is equally binding on all the courts and on all the citizens."

The cases cited in the note will be found to support the principle, that the Supreme Court of the United States may always construe the contract of the state, when it is alleged that the obligation of that contract has been impaired by subsequent legislation. While most of them do not deal explicitly with the distinction between the act and the contract which it helps to create, the decisions are not inconsistent with this principle.[2]

In *McCullough* v. *The Commonwealth of Virginia*,[3] it is distinctly pointed out. On page 138 Mr. Justice Brewer says; "Neither is the argument a sound one. It ignores the difference between the *statute* and the *contract*, and confuses the two entirely distinct matters of *construction* and *validity*. The statute precedes the contract. Its scope and meaning

[1] 6 Wheat. 131 (1821), Marshall, C. J.

[2] Jefferson Branch Bank *v.* Skelley, 1 Black. 436 (1861); Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116 (1861); University *v.* The People, 99 U. S. 309 (1878), Miller, J.; Louisville & Nashville R. R. *v.* Palmes, 109 U. S. 244 (1883); Louisville Gas Co. *v.* Citizens Gas Co., 115 U. S. 683 (1885), Harlan, J.; Wright *v.* Nagle, 101 U. S. 791; Mobile & Ohio R. R. *v.* Tenn., 153 U. S. 487 (1893), Jackson, J.; Huntingdon *v.* Attrill, 146 U. S. 657; Bryan *v.* The Board of Education, 151 U. S. 639 (1893), Harlan, J.; McCullough *v.* The Com. of Va., 172 U. S. 102 (1898), Brewer, J.

[3] *Supra*.

must be determined before any question will arise as to the validity of the contract which it authorizes." Of course the question as to the *validity of the act* would arise before either of these.

Lastly we wish to call especial attention to the case of *Pease* v. *Peck*.[1] This case came up by a writ of error to the Circuit Court of Michigan. The question here was not as to the construction of a statute, but as to what the statute in fact was. The statute of limitations, as passed, did not contain a saving clause, excepting persons "beyond seas." Such a clause was inserted in the published copy. For a long period the statute was treated by the courts as containing this provision. A copy of the original act having subsequently been discovered, and the Supreme Court of Michigan having determined that its former treatment of the statute was incorrect, it was urged that the United States Court should apply the latter construction in the case before it. This the court refused to do. The language of Mr. Justice Grier is: "The territorial law in question had been received and acted upon for thirty years, in the words of the published statute. It has received a settled construction by the courts of the United States, as well as of the state. It had entered as an element into the contracts and business of men. On a sudden, a manuscript statute, differing from the known public law, is disinterred from the lumber room of obsolete documents. A new law is promulgated by judicial construction which, by retro-action, destroys vested rights of property of citizens of other states, while it protects the citizens of Michigan from the payment of admitted debts."

This statement, it will be perceived, is very strong. It assumes that a meaning is engrafted into a legislative enactment, that was never there. This is done by means of judicial construction.

Mr. Justice Campbell and Mr. Justice Daniel dissented, but solely on the ground that they did not think it appeared that the Supreme Court of Michigan had ever construed the

[1] 18 How. 599 (1855), Grier, J.

statute. They expressly admitted the points of law laid down by the court.

It should be noted that Mr. Justice Grier did not deny the right of the Supreme Court of Michigan "to promulgate a new law," but only denied the right of any state court to apply that law to existing contracts. It is submitted that, if this decision be sound, it must follow as a matter of logic, that a court, by its construction, may change a law in fact. Here the law, as passed, did not contain a clause which the courts of Michigan said it did. The Supreme Court of the United States say that during that period, the law *was what the Michigan courts said it was*. This can mean only one thing. The court's declaration changed the law. It is submitted, after this examination of the cases, that, rightly or wrongly, the courts have actually decided,

(1) *Judicial interpretation of state statutes by state courts makes, in fact, a part of the law of the state.*

(2) *A change of judicial interpretation is, in fact, an amendment of the law.*

(3) *When state courts have so applied such an amendment as to impair the obligation of a contract, the federal courts, when they have acquired jurisdiction by virtue of diverse citizenship, will refuse to follow the decision, because to do so would be to apply a "law," (i. e., the altered interpretation, not its application to the contract) which impairs the obligation of contracts, and which is forbidden by the federal constitution.*

Section V.—DISCUSSION OF THE CASE ON PRINCIPLE.

It is neither possible nor desirable in the scope of this paper to go deeply into the subject of judicial legislation, nor is such its purpose. This work was undertaken, primarily, to show that the Supreme Court of the United States is holding two inconsistent positions. If we succeed in showing that, on principle, one of the two must be abandoned we shall feel amply repaid. This inconsistency will be dealt with in the section on Jurisdiction. The present section will be devoted to an endeavor to develop a little more clearly than the cases disclose the theory upon which the courts have been working to

reach the conclusions which we have just noted, and to a discussion of the soundness or unsoundness of that theory.

What the courts have said, whether rightly or wrongly, is this: The legislature passes a law, which we will call *A*. The State Supreme Court interprets the law to be valid; this interpretation which is final and conclusive, we will call *B*. The two combine and the law becomes *AB*, and is now complete. Subsequently, the court declares the law void. This last interpretation we will call *U*. The question before the court was this: Are rights acquired under *AB* to be lost by construction *U*, and the court said No.

The reasoning runs about as follows: One who relies upon the faith of *A* really relies upon the accuracy of an interpretation, which he has himself, put upon the words of the act. He may think that the act is valid, when it is really void, but he cannot complain for a loss occurring through his own error, and is not, therefore, protected. The theory is that *A* alone is incomplete, because the legislative body in this country has no power, as in Europe, to pass upon the validity of its own statutes, and thus to guarantee rights from the moment of their passage; that no rights, therefore, can be acquired until the proper court has declared authoritatively that the law is valid. But as soon as this has been done, then the individual is fully protected. He is protected as to *A*, because the legislature cannot impair his contract by its repeal; he is protected as to *B*, because the court cannot impair his contract, by varying its ruling and declaring the law void. This, in brief, is without question what the courts have laid down as law, in those cases which we have examined.

To reach this conclusion it is, of course, necessary to hold that rights may be acquired under a statute afterwards declared to be void. This, in turn, rests upon the theory that a judicial decision, when it construes a state statute, does not merely interpret, but helps to make the law, and that a subsequent judicial decision altering that construction is a "law," within the meaning of the federal clause forbidding the state to pass "laws" impairing the obligation of contracts; and that the federal courts may, for that reason, refuse to apply it. In other

words, the whole principle at the bottom of *Gelpcke* v. *Dubuque*, and all the cases following it, rests upon the assumption, not expressed, it is true, but there, nevertheless, that the function of the Supreme Court of a state, when determining the validity or invalidity of a state statute, is, in its nature, a legislative and not a judicial function.

We fully realize that we shall be treading on very delicate ground if we consider a theory which recognizes that a court's decision may partake of a legislative character. Most of those writers who have supported the case, have carefully avoided the admission that the decision involves this theory, or else have contented themselves with the simple statement that the courts have decided the matter. We do not feel satisfied to stop at this point. We believe, in the first place, that it is a more honest treatment of the case to take the bull by the horns, and admit the principle in its full significance, and, in the second place, we are desirous to see if the rule can be harmonized with the great body of law, of which it forms a part.

A. The rule in Gelpcke v. Dubuque has never been disputed by authority.

Under this phase of the question we will start with the statement, upon which some writers have been content to rest their support of this case, that in this country the courts have laid it down as a rule of law that whenever the Supreme Court of a state determines as to the validity of a statute such decision makes a part of the law of the state—*i. e.*, it is a decision of a legislative character. In opposition to this it is said that it is an ancient and uncontradicted principle, that the courts do not make or change the law, but that they merely expound and apply it; therefore, when a decision is reached, the true theory is that the law always was as last expounded. This was Mr. Justice Miller's great argument in his dissenting opinion in *Gelpcke* v. *Dubuque*. He says if the courts declare a law void, then it is void absolutely from the beginning, and no rights can be acquired under it.

As we have shown, the courts have absolutely repudiated this view, for they have enforced rights thus acquired in a

long line of well-considered opinions. In answer to the argument advanced by Mr. Justice Miller and others, who press the general rule as to the function of courts and judges, it is said: "To this general doctrine there is one well-established exception, as follows: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'"[1]

To this it is replied: "But there can be no exception to a universal and positive rule of law, and unless you can show some *reason* for your exception you cannot support it on principle." This, then, is now the situation—one side pointing to a long line of Supreme Court decisions to justify the exception, the other citing a positive rule of law.

We wish, at this point, to go a step farther. We propose to show that the rule, as developed in these cases, is not really an exception at all, because the general rule adduced by Mr. Justice Miller *et al.* does not apply to it; but that it is a rule, absolutely unique, concerning which there is no authority except in this country.

The rule that courts never make or change, but only interpret, law, was imported into this country from the common law of England. We do not admit nor deny the principle as applied to the common law, though we confess a secret feeling of approval with which we read the language of an old English judge who declared that he, for one, could not understand the theory that the common law had always existed, unknown to man, from the beginning of time, and that the courts were still striving to find out what it was; and who intimated his belief that he himself, together with his companions, was helping to make that same common law.

But, however this may be, we confine our remarks strictly to cases where state courts are interpreting the validity of state statutes, and we say that the rule, as existing in England,

[1] Ray *v.* Gas Co., *supra*, p. 27.

has no application to the case where a court is passing upon the validity of a state statute, because in England *the courts have not, and never have had, the power to pass upon the validity of an act of Parliament.*

Not only is this true of England, but of all other countries as well. Mr. Hannis Taylor, in his work "The Origin and Growth of the English Constitution," speaks of this peculiarity in American law; and we must remember that the same remarks will apply to the national and state courts, for they both have the same constitutional power to judge of the validity of legislation.

He says:[1] "The Supreme Court of the United States has no prototype in history. Judicial tribunals have existed as component parts of other federal systems, but the Supreme Court of the United States is the only court in history that has ever possessed the power to finally determine the validity of a national law. Such a jurisdiction necessarily arises out of the American system of constitutional limitations upon the legislative power—a system under which all judges, both state and federal, possess the power, in their respective spheres, to pass upon the validity of every law that can emanate from a state or federal legislature. In the English system such a jurisdiction could not exist, for the reason that the English Constitution imposes no limitation upon its legislative assembly; there is no 'higher law' by which the English courts can test the validity of an act of Parliament."

Without, at this point, going into the question as to whether the function of the court in such cases is actually legislative or judicial, enough has been said to show that the rule of law adduced to overthrow the theory of these cases ought not to be given an authoritative position. To say that in England courts do not make, but only interpret, the common law, does not prove that courts in America do not exercise different functions when performing a different service.

Eliminating that precedent, we have left only the authority of the United States Supreme Court. The principle of *Gelpcke*

[1] 4 Ed. Vol. I, p. 73.

v. *Dubuque* has never been questioned in that court. The cases have refused full recognition to the doctrine by disallowing writs of error to state courts, as we shall show in the last section, but they have not attempted to overturn the foundation principle.

That principle is a unique rule, developed exclusively in this country, and is an outgrowth of our peculiar system of laws. Unless, therefore, the principle which we have shown to be at the bottom of *Gelpcke* v. *Dubuque* is intrinsically wrong, the case must be considered to be good law.

We will ask a further indulgence at this point, that we may devote a portion of this section to the purpose of investigating whether it may properly be said that the power to pass authoritatively upon the validity or invalidity of an act of legislature is a power appertaining to the legislative department of government, or whether it is more correctly called a strictly judicial function.

B. Is the function of American courts, when deciding as to the validity of legislative acts, a legislative or judicial function?

We shall discuss this question under three topics:

(1) The *status* of the power to negative legislative acts in European countries.

(2) An examination of the opinions of the framers of the Constitution, as expressed in the federal convention.

(3) The manner in which the exercise of the power was received by the country.

(1) The Status of the Power to Negative Legislative Acts in European Countries.

As we are now about to discuss the nature of a power, granted over one hundred years ago to one department of our government, it is of the highest importance to see where that power had hitherto rested in European countries, and what was the prevailing opinion as to its nature.

There are two distinct methods of interpretation of laws, recognized by both civil and common law.

(a) *Authentic interpretation*, which determines the validity or invalidity of the law.

(b) *Judicial interpretation*, which, according to certain rules, interprets the meaning of the law-making power.

The first belongs to the legislative power; the second to the judicial. We find this rule laid down in "Merlin's Repertoire:"

"*C'est au legislateur qu'il appartient naturellement d'interpréter la loi: ejus est legem interpretari cujus est legem condere. C'est une maxime tirée du droit romain. Quis enim* (*disait l'Empereur Justinien dans la loi 12 C. de legibus*), *legum enigmata solvere et aperire idoneus esse videbitur, nisi is cui soli legislatorem esse concessum est. En France nos rois se sont toujours reservé l'interpretation de leur ordonances.*"[1]

Authentic interpretation has always been considered, in the European countries, to be a function of the supreme law-making power. It overrules the interpretation of judges, if the two conflict. It is said that this must be true, otherwise the legislative body would be deprived of part of its legitimate power, which would thus be given over to the courts.

The German view is well expressed in the case of *K. and others* v. *The Dyke Board of Niedervieland:*[2] "The constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights." This power, declared to belong to the legislative body, is, it will be noted, precisely the same which our courts possess of determining if the law be contrary to "well-acquired rights," or, in other words, if it be in contravention of the will of the people, as expressed in their constitution.

In Switzerland, where they have a written constitution very similar to ours, we find this rule even more plainly laid down.

[1] Cited in Brinton Coxe's "Judicial Power and Unconstitutional Legislation," p. 60.

[2] Decisions of the Reichsgericht in Civil Causes, Vol. IX, p. 233.

J. M. Vincent, in his book entitled "State and Federal Government in Switzerland," says:[1] "Contrary to the practice of American courts, the Swiss cantonal tribunal does not try acts of the legislature, because the legislature is regarded as the final authority on its own act." Here the function which the Swiss declare to be a legislative function is exactly the same which we have delegated to our judiciary—*i. e.*, the right to decide between the authority of the constitution and of the law enacted by the legislature.

Turning now to the country from which we derive more directly our system of law, we find the same idea followed out. Blackstone[2] says: "But if Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that, where the main object of a statute is unreasonable, the judges are at liberty to reject it, for that were to set the judicial power above that of the legislature, which would be subversive of all government." At the same time, Blackstone recognizes the truth of the observation made by Locke,[3] where he says: "There still remains inherent in the people a supreme power to remove or alter the legislature, when they find the legislative act contrary to the trust reposed in them."

Thus we have, in all events, the same situation as in our country, where the sovereignty resides in the people ultimately, but immediately in their representatives. And, in this same situation, Blackstone declares that for the courts to have the power to choose between the will of the people and the will of Parliament, would be to usurp the power of the legislature.

In *Notley* v. *Buck*,[4] the court say: "The words may probably go beyond the intention, but if they do, it rests with the legislature to make an alteration; the duty of the court is only to construe and give effect to the provisions."

[1] P. 34.
[2] Vol. I, p. 91.
[3] Of Parliament, p. 49.
[4] 8 Barn. & Cress. 160.

It is, of course, impossible to give anything approaching a thorough discussion of so great a question in this paper, but enough has, perhaps, been said to illustrate the point. We again recall the fundamental distinction between the two interpretations, the authentic or the authoritative, and the purely judicial. The latter does not enter into the discussion, for no one questions the principles applied to it; but we have now endeavored to show that the leading countries of the old world have recognized with great unanimity that the former interpretation belongs to the power which makes the law. Hobbes says: "The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law."[1]

This power, thus recognized to be legislative in its character, is in America delegated to the Supreme Courts of the United States and of the several states. The question then arises: Is there any ground for the statement that this power, when in this country it is given to the courts, loses its legislative character and becomes purely a judicial function? We are inclined to answer that question in the negative. We are unable to conceive how a change of the body which executes the power can change the inherent nature of the power itself.

Bowyer in his "Readings Before the Middle Temple," enunciates the theory, in pursuance of which so many writers and judges have said the power of the courts to pass upon the validity of a state statute is a purely judicial function. He says:[2] "But the American courts are invested with a jurisdiction unknown to the constitution of this country. The Constitution of the United States is a written constitution, erected by delegation of powers from the people to the government; and the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. . . . It follows from these fundamental principles, which, indeed, belong to every federal polity, that the Constitution is the supreme law which is the test of the validity of all other

[1] Cited in Austin's Jurisprudence, Vol. I, p. 201.
[2] P. 81 *et seq.*

laws. And the principle so well laid down by Montesquieu, that the legislative must be separated from the judicial power, applies to the instrument of the Constitution. It follows that the power of interpreting the laws, vested in the national courts, involves necessarily the function to ascertain whether they are conformable to the Constitution or not; and if not so conformable, to declare them void and inoperative. As the Constitution is the supreme law of the land, it becomes the duty of the judiciary, in a conflict between the Constitution and the laws, either of Congress or of the state, to follow that only which is of paramount obligation. . . . The judicial power is thus made the guardian of the Constitution. . . . This does not imply a superiority of the judicial over the legislative power, though as a general proposition the authority which can declare the acts of another void is superior to the one whose authority may be declared void by the former. The theory of the law on this subject deserves some examination. The act of a delegated authority, contrary to the commission or beyond the commission under which it is exercised, is void. *Diligenter fines mandati custodiendi sunt: nam qui excedit, aliud quid facere videtur.* He who acts beyond his commission, acts without any authority from it. Now the judicial power can declare void the acts of the legislative power, where those acts are beyond the delegated power of the legislature, and, therefore, not legislative acts except in form only. Thus the judicial power is not placed above the legislative power, because the former must obey the valid acts of the latter."

This eminent writer first admits that the power to pass upon the validity of legislative acts is in all other countries a legislative function, then he declares in America it naturally belongs to the courts because

(a) The Constitution is the supreme law of the land and

(b) The Federal Government is one of delegated powers. It is conceded that the power exercised by the American courts, if exercised by English or Swiss or German or French courts, would be legislation; but, it is said, it is in America a judicial function, because the court does not of its own au-

thority adjudge the law void, but merely chooses between two laws, and enforces the one which is paramount.

To support this distinction is to declare that in all countries, except the United States, the legislative power is absolutely independent of all constitutional restriction, which is far from true. In Switzerland they have a written constitution very similar to ours. The people are recognized fully as the sovereign power. What then is the function of the legislature of Switzerland? It determines, as a matter of interpretation, that a particular law is consistent with the written Constitution, when it passes that law. This interpretation is authoritative and final. The same function is exercised by the legislature of Germany as we have seen. The legislature first decides that a law, if passed, will be consistent with "well-acquired rights," then it passes the law. This interpretation is nothing but a balancing of the proposed law against the acknowledged limitations imposed by the German Constitution. In England, as we have pointed out, the law recognizes the ultimate sovereignty to be in the people. It also recognizes Parliament to be the supreme legislative power; but by no means does this mean that Parliament is actually unlimited. Its acts must conform to the English Constitution, as evidenced by that great body of definite and clear, though unwritten, precedents. It is said that Parliament technically has the power to pass any law, no matter how unreasonable; but, at the same time, it is conceded that practically Parliament cannot do that, because, as Locke says, the people would deprive them of the power of which they had proven themselves unworthy. Because the English people do not possess the machinery which we do, their power is not any the less real, nor any the less potent. Now when Parliament goes to pass a law, what does it do? It frames the bill, and then in the exercise of its power to authoritatively interpret, decides that the law will be consistent with the rights of the British people.

This is done both by debate in the House of Parliament, and by obtaining the opinions of judges, who not only sit in Parliament for that purpose, but are expressly called in to give their opinions in doubtful cases.

The constitutionality of the act is passed upon just as much as if Parliament first blindly passed it, and then delegated the authoritative power to interpret to a court. The act of passing the law decides both points as a finality. Is this any less real interpretation of a statute than the interpretation which we exercise in this country?

We confess our inability to see the distinction contended for by Mr. Bowyer. The constitution is recognized to be the supreme law of the land in each of the four countries which we have mentioned, and in at least two written constitutions are *expressly declared* to be the supreme authority. As we have shown, the act of interpretation, as performed by the legislatures of those countries, is in its nature the same in all respects as is performed in America by the courts. In both cases the interpretation is a determination between two laws: the constitution and the will of the legislative body, expressed on the one hand by a bill framed, on the other, by a law passed. In the one case the power to interpret its own laws is recognized to be inherent in the legislative body. In the other, that power is taken away from the legislature by the people and given to the judiciary. Does that make it less a legislative power? We are unable to see how the instrument by which the power is executed can change its inherent nature.

In the second place, Mr. Bowyer says that contrary to European governments, the Federal Government of the United States is one of purely delegated powers. We believe this difference to be mainly one of degree, in that the limits beyond which our governmental acts cannot be carried, are more sharply defined, but we will avoid the whole discussion by again calling attention to the fact that we are dealing only with the power of a state court to declare a state statute void, and that the state governments are governments not of delegated, but of inherent powers. Mr. Bowyer's remarks upon this point have no application to our discussion.

We respectfully submit at this point the following conclusions:

(a) *The power given to the Supreme Courts of the United States and of the several states, to authoritatively interpret laws*

passed by their respective legislatures, is precisely the same power as that exercised by the legislative bodies of Europe, i. e., the power to decide between the expressed will of the legislature, and the constitution of the state.

(b) *This power is recognized in all nations, except the United States, to belong, as of inherent right, to the legislative department of government.*

It is proper to remark here that all this discussion is quite apart from the right of any court, when applying a statute, to judicially determine the meaning of its words.

(2) An Examination of the Opinions of the Framers of the Constitution, as Expressed in the Federal Convention.

After this rather limited discussion, we have arrived at the conclusion that the power to authoritatively determine between the fundamental law of the land, and a law passed by the legislative body of that land, has always in Europe been deemed to be a power appertaining to the legislature. Keeping that thought in mind, we now desire to devote a portion of this section to a brief investigation of the manner in which our courts were granted these extraordinary powers. In conducting this investigation, three things will be considered:

(a) The end which the framers of the Constitution had in view.

(b) Methods proposed, by which it was intended to accomplish this purpose.

(c) The clause or clauses in the Constitution, by virtue of which, the courts obtained the power to pass upon the validity of legislative acts.

(a) The End which the Framers of the Constitution had in View.

There is no difficulty in determining the purpose of the framers of the Constitution during the debates and proposals culminating in the delegation of the whole question to the judicial department. This intention was, to use the expres-

sion most often heard, "to put a check upon the legislative department."

The statesmen of that day had had a severe object lesson of the evils that could be inflicted by an unlimited legislative body, and they determined to provide against a repetition of the experience.

It had already been provided in the proposed constitution, that the powers of the legislature should be exercised only within certain limits, but it was recognized that this was not sufficient. It is true we find occasional references to the power of the courts in such cases, but it is plain that the members of the convention fully realized that, without more, the legislative department would be dangerously powerful, because they still retained the power to decide, whether their action was, in fact, contrary to the Constitution. As will be shown later, various plans were brought forward to accomplish this purpose, *i. e.*, to make some power, outside of the legislature itself, the judge of the validity of its laws.

Now, if, as is sometimes contended, the decision of this question is purely a judicial one, why was any further guarantee necessary? The same constitutional limitations, which we have to-day, had already been drafted. The courts were provided for, and to them it was proposed, of course, to give full *judicial* power. It seems reasonable to suppose that the idea that the legislature was the natural interpreter was present in the minds of the men who were engaged in framing the Constitution.

This is indicated by the language of Mr. Bedford, when discussing a proposed check on the legislature. The report reads: "Mr. Bedford was opposed to every check on the legislature, even the council of revision first proposed. *He thought it would be sufficient to mark out in the Constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments. The representatives of the people were the best judges of what was for their interest, and ought to be under no external control whatever. The two branches would produce a sufficient control*

within the legislature itself.[1] Mr. Bedford said, "It would be sufficient to mark out the boundaries to the legislative authority" in the Constitution, and gave as his reasons, that in his opinion the representatives of the people are the best interpreters of legislative acts. Clearly Mr. Bedford thought that in the absence of express provisions to the contrary, the legislature would be the interpreter. We conclude that the convention recognized that some express provision must be inserted, in order to take away from the legislature its inherent right to decide as to the validity of its own laws.

(b) METHODS PROPOSED BY WHICH IT WAS INTENDED TO ACCOMPLISH THIS PURPOSE.

The first problem that seems to have presented itself to their minds, was how to force the states to observe the constitutional restraints laid upon them. They seemed to recognize that the extent of the constitutional restraints was to be judged by the legislative department. The question was, by which one, the national, or the state. Mr. Langdon, when a proposition to give this power to the federal legislature was before the convention, said: "He was in favor of the proposition. He considered it as resolvable into the question, *whether the extent of the national Constitution was to be judged of by the general or state governments*."[2] He seemed to recognize but the two alternatives.

In pursuance of this purpose, and recognizing this principle, the following resolution, embodied in the Virginia plan, was proposed to the convention by Mr. Randolph:

"*Resolved* . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states contravening, *in the opinion of the national legislature*, the articles of the Union, or any treaty subsisting under the authority of the Union."[3]

This proposition, to vest the power of determining the extent of the federal limitations in the national legislature,

[1] V. Elliot's Debates, 153.
[2] *Ib.* 168.
[3] *Ib.* 128.

was upheld in the most determined manner by such men as Madison, Jefferson (who first proposed it), Randolph and Pinckney. Their support of this proposition shows that they considered the legislative power to be the natural judge of questions of this character.

This proposal, in one form or another, was brought up again and again, thoroughly debated and finally rejected, not because of any inherent, wrong principle which it contained, but because it was deemed inexpedient to adopt it, owing to the procedural difficulty of applying it. Mr. Lansing, objecting, said: "It is proposed that the general legislature shall have a negative on the laws of the states. Is it conceivable that there will be leisure for such a task? There will, on the most moderate calculation, be as many acts sent up from the states as there are days in the year."[1] Mr. Dickinson favored an absolute negative in the national legislature. He said: "We must take our choice of two things. We must either subject the states to the danger of being injured by that of the national government, or the latter to the danger of being injured by that of the states. He thought the danger greater from the states. To leave the matter doubtful would be opening another spring of discord, and he was for shutting as many of them as possible."[2] He did not seem to conceive that the judiciary could fill this need. It is true in some places we find references to the power of the judiciary to judge of the laws, but it is impossible to believe that, at this time, the framers of the Constitution had fully conceived of the feasibility of vesting such powers in the judiciary, or they would not have considered that a like power should be given to the national legislature.

The observations last referred to were made on June 8, 1787, before the convention had more than begun its labors. As the discussion went on, the convention leaned more and more toward a plan to give over the whole matter to the courts. They were inclined to this course for two reasons: First, because of procedural difficulties as we have seen; and,

[1] V. Elliot's Debates, 215.
[2] *Ib.* 173.

secondly, because the judiciary was recognized to be more conservative and, therefore, less liable to radical action. On July 17th, the clause granting a legislative negative was lost by a vote of three for and seven against. Mr. Madison favored it still because he thought nothing less would control the states.[1] Mr. Morris and Mr. Sherman favored giving the matter over to the courts.[2]

Immediately after the motion was lost, Mr. Martin, who had been one of its active opponents, moved a resolution,[3] which vested in the judiciaries of the several states the authority to decide between the acts of the national and of the state governments. This motion was agreed to without dissent. The convention apparently receiving it as a substitution for the motion just lost. Mr. Brinton Coxe observes, "In finally rejecting the legislative negative, and overruling its previous action, the convention took a step backwards only to make a leap forwards. Luther Martin's motion in favor of the plan of what is now paragraph 2, Article VI, was, as before stated, immediately offered and adopted without opposition, and apparently without debate. Such action is incomprehensible, if the framers intended to abandon what had been their avowed object, as well as to abandon the measure by which they had intended previously to secure that object. In first adopting and then discarding a legislative negative to be applied with legislative discrimination, and substituting therefor a judicial discrimination applying a general clause of derogation, they intended only to change the means of accomplishing their object, and not to abandon that object itself."[4] If Mr. Coxe's reasoning be sound, we must conclude that the framers of the Constitution, having first recognized as a legislative function the power to judge as to the constitutionality of laws passed by the state legislatures, which it was proposed to vest in the national legislature, then concluded to accomplish the same end by delegating this power to the courts.

[1] V. Elliot's Debates, 321–2.

[2] *Ib.*

[3] *Ib.*

[4] Judicial Power and Unconstitutional Legislation, p. 333.

This delegation, of course, could not change the nature of the power.

The legislative negative, however, was not yet entirely killed. It came up twice more and was finally disposed of only on September 15th. On that day the committee laid before the convention a substitute for Article I, Section 10, which, after providing that no state should lay any imposts or duties on imports, etc., etc., without the consent of Congress, concluded: "and all such laws shall be subject to the revision and control of Congress."[1] This was a last attempt to give to Congress precisely the power which the courts of the several states and of the United States now exercise. The motion was lost by a vote of seven to three.

This discussion of the legislative negative is here given to show that, at first, the men who composed the convention thought only of giving the discriminating power to a legislative body. That they abandoned the means on account of procedural difficulties, mainly, and, keeping the same object before them, delegated this power to the judiciary. The avowed purpose of thus depriving the legislative bodies of the interpretation of their own laws, was to limit their power still further than could be done merely by constitutional restrictions, the extent of which they had the power to judge. As this power was taken from a legislative body, it must have been a legislative power. Giving it to the judiciary did not make it a judicial power.

This was, perhaps, the critical point in the history of this important question, when the eminent founders of our Constitution, though recognizing the character of the power with which they were dealing, by a wise and provident policy, took it away from the legislative department of government and gave it to another department of co-ordinate authority, thus permitting the one to be a check upon the other, constituting the judiciary the perpetual safeguard of the liberties of the people, protecting them against arbitrary usurpation of power by the legislature.

[1] V. Elliot's Debates, 548.

There is little reason to doubt that, had the legislative negative become a part of our Constitution, the power of authoritative interpretation of its own laws would have been given to Congress, as a necessary adjunct of legislative power; and would have been left in the state legislatures where it already was, by virtue of the inherent sovereignty of the state. But, having once decided that the judiciary could be entrusted with so great a power to revise and check the acts of the legislature, the conclusion was natural and logical, that it should be given that power in all cases.

One other proposition should be discussed before we take up the question of the actual delegation of this power, and that is the effort to establish a revisory council, composed of executive and judges, who should pass upon the constitutionality of proposed laws. The measure was moved by Mr. Madison. It provided that "every bill which shall have passed the two houses, shall, before it becomes a law, be severally presented to the President of the United States, and to the judges of the Supreme Court, for the revision of each." It also made provision for passage, in spite of disapproval, by certain specified majorities.

We wish, particularly, to call attention to the argument of Mr. Mercer, who "heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is, that legislative usurpation and oppression may be obviated. *He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.*"[1] Mr. Morris favored the motion. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer, as to the power of the judges to set aside the law. He thought no such power ought to exist. He was at the same time, at a loss what expedient to substitute. The justiciar of Arragon, he observed, became by degree the law-giver."[2]

[1] V. Elliot's Debates, 429.
[2] *Ib.*

The remarks of these members lead us irresistibly to the conclusion that they both considered that this power, about to be given to the courts, was a legislative power, and that they, for that reason, disapproved of it. It is clear that the idea was one comparatively new, and the members had not yet concluded that it was a wise step. Mr. Madison favored giving it to the judiciary, but put his opinion on the ground of utility, without replying to Mr. Mercer's suggestion that they ought not to have it for *a priori* reasons. Indeed, it must be conceded that Mr. Mercer's suggestion that laws should "be well and cautiously made," with advice by judges, and then be uncontrollable, is one eminently reasonable and extremely difficult to answer. It would, at least, have the merit of precluding the possibility of cases similar to *Gelpcke* v. *Dubuque* ever arising.

However, the motion to provide a revisory council of judges to examine proposed laws was lost,[1] and thus it seemed, at last, to be definitely settled that the decision as to the validity of the laws should be given to the courts.

(c) The Clause or Clauses in the Constitution, by Virtue of which the Courts Obtained the Power to Pass upon the Validity of Legislative Acts.

The importance of this question, as a means of determining the opinions of the framers of the Constitution, cannot be overestimated. If the power was not directly conferred by the Constitution upon the courts, this would be competent evidence that the framers were of the opinion that no such express delegation was necessary; but that the courts already possessed it, as a strictly judicial function. We do not find it necessary to enter into the discussion, whether this power was expressly given or not, in view of the very able and exhaustive book upon the subject which has decided the question for us. Mr. Brinton Coxe, after a most searching analysis of the Constitution and the opinions of its founders, has come to the conclusion that the framers did intend, and

[1] V. Elliot's Debates, 429.

did actually confer, express authority upon the courts to declare laws invalid.[1]

The clauses which confer this power are two in number. Paragraph 2, Article VI, which lays upon the state courts the duty to decide between national and state laws, and Section 2, Article III, which extends the judicial power to all cases arising under the Constitution of the United States. Mr. Coxe observes "From this and the preceding chapter, it appears that paragraph 2, VI, and the beginning of section 2, III, have a common origin. This fact is of much importance in any commentary upon the Constitution. It is especially important in this essay, which makes the following contentions concerning those constitutional texts:

(1) In part IV of the Historical Commentary, it is contended that the evidence makes it clear that the two texts were closely connected in the framing thereof, and that the framers intentionally framed them, so as to be adapted to each other.

(2) In the Textual Commentary, it is contended that, independent of the extra-textual evidence, the two texts can be shown to be so intimately related, that they are twin texts."[2]

As we have seen, paragraph 2 of Article VI was adopted without dissent, immediately after the defeat of the legislative negative, and as Mr. Coxe declares, as a substitute therefor. The clause giving to the judiciary power to decide all cases arising under the Constitution of the Union, *was not adopted nor even proposed until August 27th, after it had become evident to the members of the convention that no other practicable plan could be adopted for enforcing obedience to the Constitution.*

On that day Dr. Johnson moved to insert the words "this Constitution and the" before the word "laws," in the clause which is now Article III, Section 2.[3]

That this vested a great and unusual power in the courts, was realized. "Mr. Madison doubted whether it was not going too far, to extend the jurisdiction of the court generally

[1] See "Judicial Power and Unconstitutional Legislation."

[2] P. 292.

[3] V. Elliot's Debates, 483.

to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department." No one remarking upon this point, the motion was passed without dissent, to make the alteration proposed, the reporter observing that it was understood by the members that the jurisdiction of the courts was limited to cases of a judiciary nature.

In this manner was granted to the courts a power never before, in the history of the world, granted to a judicial body.

Mr. Madison was still not satisfied as to his point, and moved "to strike out the beginning of the third section, 'The jurisdiction of the Supreme Court,' and to insert the words 'the judicial power,'"[1] which was agreed to.

The convention apparently realized that they had given to the courts a power which might be exercised in cases not "of a judiciary nature," and Mr. Madison was anxious that it should be limited to cases of that nature. This was the purpose of his last motion. The tables were now turned. The convention had been considering a means of checking the legislature. They decided to give a part of the legislative prerogative to the courts. Fears now arose whether they had not gone too far in giving to the courts the right to expound the Constitution in all cases. It was then suggested that the courts should only use this power in cases "of a judiciary nature." If the courts had no powers given them except those usually appertaining to courts, it would of course be an absurdity to speak of limiting their action to cases of a "judiciary nature." It is clear from Mr. Madison's remark and the assent of the Assembly to it, that they fully realized that they had given to the judicial department a power, which might be used not only outside of the usual field of judicial action, but also outside of the field in which the framers intended it to be exercised.

For this reason, they took additional precautions that the courts might not unduly encroach upon the legislature by

[1] V. Elliot's Debates, 483.

refusing to sanction laws which they might think to be improper. That their fears were not groundless, is seen from an examination of an ever-increasing multitude of cases in the state courts, where these "judicial bodies" have even gone so far as to declare laws void, because they are opposed to the "inalienable rights" which belong to every citizen.[1] The evident meaning of the framers was that this quasi-legislative power should not be exercised, except where there was a clear conflict between the Constitution and the law.

(3) The Manner in which the Exercise of the Power was Received by the Country.

Before finally leaving this branch of the subject, it may not be out of place to see how the exercise of this power was viewed in cases in which it was first actually applied. We cannot better summarize the matter than by a quotation from the address of Mr. Battle, delivered before the Supreme Court Bench and Bar of North Carolina. He says, "These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island, the claim of being the first in the United States to decide that the courts have the power and duty to declare an act of the legislature, which, in their opinion, is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the judges who had the courage to declare it, were fiercely denounced as usurpers of power. Speight, afterwards governor, voiced a common notion, when he declared that 'the state was subject to three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman Triumvirate, and equally insufferable.' In Rhode Island the legislature refused to re-elect judges who decided an act, contrary to their charter, to be null and void. In Ohio, in 1807, judges who had made a similar decision were

[1] See Godcharles *v.* Wigeman, 113 Pa. 431; State *v.* Goodwill, 33 W. Va. 179; *Re* Jacobs, 98 N. Y. 98.

impeached, and a majority, but not two-thirds, voted to convict them. . . . New York follows with a similar decision in 1701. South Carolina in 1792. Maryland in 1802. The Supreme Court of the United States in *Marbury* v. *Madison* in 1801."[1]

Although in a few isolated cases these powers had been exercised by state courts before the Revolution, that they could not *legitimately* be exercised without express power given by the Constitution, seems to be clear. This was the cause of the fierce assault which was made upon those judges, who dared to assume this function prior to, or immediately following, the adoption of the Constitution. The objections were put upon the ground that the function was a legislative one. The power was defended, not on the theory that it was one naturally belonging to the judiciary, so much as that there was in America no other body competent or appropriate to discharge this duty.

After the adoption of the Constitution this power was recognized by its defenders to be one, not inherently belonging to the courts, but a "legislative judicial power" granted to them by the Constitution. Chief Justice Marshall, whose opinion in *Marbury* v. *Madison* is most often quoted to show that he considered this to be a judicial function, said, while arguing the case of *Ware* v. *Knowlton*,[2] "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; *and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution.*"

As Mr. Marshall was one of the most prominent of those men who conferred this power, he above all others should have known its nature. His decision in *Marbury* v. *Madison* does not contradict this view. He recognized the undoubted right of the court to decide between the law and the Constitution, because he believed that power to have been conferred.

[1] 103 N. C., 472–3.
[2] 3 Dall. 199–211.

He says "The judicial power of the United States is extended to all cases arising under the Constitution.

"Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

"This is too extravagant to be maintained."[1]

Mr. McMurtrie held the same view as Mr. Marshall as to the original nature of the power, but he differed with him as to whether it had been properly conferred. He says in his observations: "Let me ask whence is derived this power that we are now discussing, that of declaring void a legislative act? Was such a political power ever heard of before? Did any state ever grant to its judicial functionaries the power of declaring and enforcing the limits of its own sovereignty? What state before conferred on a court of justice, in determining the rights of two suitors, as a mere incident, and without a hearing on behalf of the state, the power to determine that its legislative acts, approved and sanctioned by all its statesmen for thirty years, had always been mere nullities —nullities *ab initio?*"[2] Mr. McMurtrie, however, finally admits that such a power was granted, though he thinks improperly.

In the course of a debate in the Senate on the Judiciary System, in the year 1802, Mr. Breckenridge gave expression to his opinion that the power given to the courts was a legislative power, and disapproved of it for that reason. He said:[3] "To make the Constitution a practical system, the power of the courts to annul the laws of Congress cannot possibly exist. My idea of the subject, in a few words, is that the Constitution intended a separation only of the powers vested in the three great departments, giving to each the exclusive authority of acting on the subjects committed to each: That each are intended to revolve within the sphere of their own orbits, are responsible

[1] 1 Cr. 178–9.

[2] P. 13, 14, 15, cited in Coxe on Judicial Power and Unconstitutional Legislation.

[3] IV. Elliot's Debates, 444.

for their own motion only; and are not to direct or control the course of others. That those, for example, who make the laws, are presumed to have an equal attachment to, and interest in, the Constitution, are equally bound by oath to support it, and have an equal right to give a construction to it. That the construction of one department of the powers particularly vested in that department, is of as high authority, at least, as the construction given to it by any other department; that is, it is in fact more competent to that department, to which powers are exclusively confided, to decide upon the proper exercise of those powers, than any other department to which such powers are not entrusted, and who are not consequently under such high and responsible obligations for their constitutional exercise; and that, therefore, the legislature would have an equal right to annul the decisions of the courts, founded on their construction of the Constitution, as the courts would have to annul the acts of the legislature, founded on their construction.

"Although, therefore, the courts may take upon them to give decisions which go to impeach the constitutionality of a law, and which for a time may obstruct its operation, yet I contend that such a law is not the less obligatory, because the organ through which it is to be executed has refused its aid."

This quotation well expresses the views of those who oppose this system of interpreting laws proposed by the Constitution. Mr. Hamilton, in defence, thus replies to this view in the *Federalist:*[1] "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be recollected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents."

[1] LXXVIII, p. 426.

In other words, Mr. Hamilton does not deny the nature of the power, but declares that in a government where the legislative power is limited, it *must be* that the power to judge of their own laws shall be taken away from them, otherwise they would not be limited. While this is not strictly true (a constitution operating only on the conscience of the legislature, being a very powerful check), yet the founders of the Constitution deemed it necessary for their security, that this should be done. With this thought in mind they cast about for a co-ordinate department in which to deposit the legislative power which they were withholding from the legislative department, and naturally decided upon the judiciary, which, as is easily seen, is peculiarly well fitted for such a task. This is the thought expressed by Hamilton when he says, "The interpretation of the laws is the proper and peculiar province of the courts."

We conclude, after this cursory examination of the debates and writings of the men who are responsible for our Constitution.

(1) *They recognized that the power to interpret authoritatively the laws passed by the legislature was a power naturally belonging to that body.*

(2) *They desired to withhold that power from the legislature in order to further limit that department.*

(3) *They finally made provision for this power to be vested in the judiciary, because that department was deemed best fitted to carry out this purpose.*

We close the discussion by remarking, once more, that as the power is in its nature a legislative power, it is not changed because it is exercised through the medium of the judiciary.

C. Concluding observations.

We now approach the end of the discussion of the principle involved in *Gelpcke* v. *Dubuque*. As we have previously pointed out, the case rests upon the theory that the function of state courts when declaring legislative acts void, is of a

legislative character. This section has been devoted to an investigation of the soundness of that theory. We have shown

(1) *That in all nations except the United States the power to interpret their own laws actually belongs to the legislative department.*

(2) *That the power granted to the courts by the federal Constitution was recognized, by its framers, to be a legislative-judicial power.*

In considering the second point, we have discussed more particularly the federal courts. The same reasoning, however, will apply to the state courts, even more forcibly. First, because state constitutions are modelled after the federal Constitution, and, secondly, because the state governments are inherent sovereignties.

When we conclude that the function of declaring acts invalid is a legislative function, we do not mean to say that it is not performed in a judicial manner. From its very nature, it must be. In countries where the legislature possesses the power to interpret its own laws, it always calls in the aid of judges to assist it in determining between the law and the constitution. Nor would we wish to have it supposed that we are not in favor of that wise and far-seeing policy, which gave this important power to a functionary so able to exercise it.

But, at the same time, we insist that this power should be recognized in its true character. The fundamental difference between our government and the governments of all other countries, is that their constitutions are binding only on the consciences of their legislative bodies. The framers of our Constitution had learned by experience to fear a legislature limited only by its own judgment as to its powers. This was the moving cause of the constitutional provision.

Recognizing, therefore, the power to be legislative, on principle, its exercise should be given the effect of a legislative enactment. And this is precisely what the courts have done ever since the first case arose, where rights depended upon the view taken of the nature of this power. All through the cases we find the expression continually repeated, "a change

of judicial interpretation should be given the same effect as a legislative amendment." It has been consistently asserted that a "state can impair the obligation of contracts, no more by decisions of its courts, than by legislative acts." Thus continually recognizing, without actually saying it, that the two stand, in this regard, upon an equal footing. The courts have reached this conclusion because they realize that any other course would be most unjust to the individual, and most dangerous in its influence upon the state. But that they have not fully accepted the court's action to be legislative in its *intrinsic character*, is inferrible from their action in refusing writs of error to state courts.

The application to *Gelpcke* v. *Dubuque* is plain. The later decision of the Iowa court declaring the act invalid, was of course an exercise of the legislative prerogative of the Supreme Court of a state. It was, therefore, exactly in the position of a repealing act, and if given retroactive effect, it would impair the obligation of contracts entered into before its enactment.

The Circuit Court did so apply it. The Circuit Court, therefore, gave it such an effect that it did impair the obligation of contracts. Therefore the Supreme Court very properly said, "This amendment to the law, promulgated by the State of Iowa, you have so applied to a contract, as to impair its obligation. Therefore we will reverse you. This amendment is valid as to the future, but cannot affect vested rights which are protected by the federal Constitution."

Our final conclusion is that *Gelpcke* v. *Dubuque* is sound, not only because the peculiar rule as there laid down has never been contradicted by any court or by any principle of law applicable to it, but because, starting from *a priori* grounds, we arrive on principle at the same conclusion.

We cannot close the subject, however, without devoting a closing section to a discussion of the anomalous position of the Supreme Court, in refusing to allow writs of error to state courts in cases similar to *Gelpcke* v. *Dubuque*.

SECTION VI.—SHOULD THE SUPREME COURT ALLOW WRITS OF ERROR TO STATE COURTS IN CASES SIMILAR TO GELPCKE v. DUBUQUE?

We have elsewhere incidentally referred to the anomalous position assumed by the Supreme Court on this question. In cases of this nature, where they acquire jurisdiction by reason of the citizenship of the parties, they disregard the decisions of state courts. They do this because the state court has upheld an altered interpretation of a state statute, which impairs the obligation of a contract. In this class of cases they hold such an interpretation to be a "law" within the meaning of the federal clause. But if the case is brought up by writ of error to a state court, the Supreme Court will refuse to take jurisdiction, beause, they say, for purposes of jurisdiction a state decision construing a statute is not a "law."

Thus, one who is so fortunate as to be a citizen of a state other than the one where the cause of action arises may obtain relief; while an individual who is so unfortunate as to be a citizen of the same state has no remedy. This condition of affairs is little less than monstrous. The two positions are absolutely irreconcilable. We shall discuss this subject under three heads:

A. An examination of the cases similar to *Gelpcke* v. *Dubuque* which have come up by writ of error to state courts and have been refused consideration.

B. An examination of cases coming up by writ of error to state courts where the act involves a contract.

C. The question o jurisdiction examined on principle.

A. An examination of the cases similar to Gelpcke v. Dubuque which have come up by writ of error to state courts and have been refused consideration.

Ever since the date of the decision in *Gelpcke* v. *Dubuque* cases from state courts involving similar facts have been consistently applying to the Supreme Court for their consideration and have been consistently refused. The two lines of cases have grown up side by side. The only explanation which can be offered for this strange spectacle is that the court

recognized the justice of refusing to give a state court's re-interpretation of a statute a retroactive effect, and at the same time shrank from calling it a "law" in the technical language of the judiciary acts. That this would have been not only the more honest but also the more correct course, would follow from the conclusions worked out in this paper.

The first case where the question was before the court was *Railroad* v. *Rock*.[1] In that case the facts were identical with *Gelpcke* v. *Dubuque*, except for the circumstance that here the parties were citizens of the same state. The court dismissed the writ because they declared that the case might have been decided on the ground of fraud, and that *not only must it be shown that a federal question might have been involved, but it must be shown that it necessarily was involved.* This ground was ample, and the court so considered it, for the dismissal of the writ. What follows cannot have the full force of a decision, but must partake of the nature of a *dictum.*

The court, however, then went on to say: "That counsel had based their whole claim on the ground that 'the Supreme Court of Iowa had made a decision impairing the obligation of a contract,' and had based their entire argument on the fundamental error that this court can as an appellate tribunal reverse the decision of a state court, because that court may hold a contract to be void which this court might hold to be valid." It is submitted that if counsel did base their whole claim on that broad assumption, they deservedly and unquestionably failed to make out a case for the consideration of the Supreme Court of the United States.

The argument of counsel is very briefly reported, so we can hardly tell whether or not they distinguished between state decisions which interpret state statutes, and state decisions which merely interpret contracts. Mr. Justice Miller, who delivered the opinion, made no distinction, and evidently considered only state decisions in their broad sense. Viewed in this light, the statement of Mr. Justice Miller is unquestionable. He says that the court would refuse to assume jurisdiction,

[1] 4 Wall. 177 (1866), Miller, J.

because "If this were the law, every case of a contract held by the state court not to be binding, for any cause whatever, would be brought to this court for review, and we should thus become the court of final resort in all cases of contract where the decisions of the state courts were against the validity of the contracts set up in those courts."

No one would question Mr. Justice Miller's argument if his premises were sound. He assumes that the Supreme Court were asked to review the state court's construction of a contract. It is submitted that this is incorrect. It was not the construction of the contract, *but the interpretation of the statute*, that impaired its obligation. The Supreme Court were asked to review the decision which *upheld* and *applied* that altered interpretation.

Railroad v. *Rock* first laid down the rule that the Supreme Court would not in such cases assume jurisdiction. The part of the opinion devoted to the question we are discussing, which was only a few lines in extent, was not necessary for the decision, and yet this case undoubtedly is the foundation of all the other decisions which follow it in adopting the same course.

As these cases are all very similar in their facts, an extended investigation would be of no service. We shall quote, however, from one of the later cases to show the development of the doctrine, and cite some of the intervening cases in the note.[1] In *Bacon* v. *Texas*, Mr. Justice Peckham for the court says: "The argument involves the claim that jurisdiction exists in this court to review the judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract, by reason of the alteration by a state court of a construction heretofore given by it to such contract, or to a particular statute, or series of statutes, in

[1] R. R. *v.* McClure, 10 Wall. 511 (1870), Swayne, J.; Bank *v.* Bank, 14 Wall. 9 (1871), Swayne, J.; Palmer *v.* Marston, 14 Wall. 10 (1871), Swayne, J.; Kennebec River *v.* R. R., 14 Wall. 23 (1871), Miller, J.; Dugger *v.* Bocock, 104 U. S. 596 (1881), Waite, C. J.; Lehigh Water Co. *v.* Easton, 121 U. S. 388 (1886), Harlan, J.; N. O. Water Works *v.* La. Sugar Ref. Works, 125 U. S. 19 (1887); Central Land Co. *v.* Laidley, 159 U. S. 102 (1895), Gray, J.

existence when the contract was entered into. Such a foundation for our jurisdiction does not exist. It has been held that where a state court has decided, in a series of decisions, that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to railroad companies, and such had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after the issue of the bonds, and holding that the legislature has no power to permit the municipality to issue them, and that they were therefore void. Such are the cases of *Gelpcke* v. *Dubuque* and *Douglas* v. *Co. of Pike*. In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity, made by the highest court of a state, prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract, and will be given effect to by this court, as against a subsequent changing of decision by the state court, by which such legislation might be held to be invalid. But effect is given to it by this court, only on appeal from a judgment of a United States court and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void, which it had prior thereto held to be valid. It has no jurisdiction, because of the absence of any legislation subsequent to the issuance of the bonds, which had been given effect to by the state court. In other words, we have no jurisdiction because a state court changes its views in regard to the proper construction of its state statutes, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract." [1]

This opinion is quoted somewhat at length that we may have before us the reason why a writ of error is not allowed, and that we may, if possible, perceive the distinction between this case and the line to which Mr. Justice Peckham referred as

[1] 163 U. S. 207 (1895), Peckham, J.

represented by *Gelpcke* v. *Dubuque* and *Douglas* v. *Co. of Pike*. We do not derive much satisfaction from a perusal of his language, and yet this is the latest exposition of the subject.

The reason given why the court does not take jurisdiction is because there has been no subsequent statute passed impairing the obligation of contracts, and which the state court has upheld, which is declared to be a condition precedent to bringing up a case under the 25th section of the Judiciary Act. The court does not attempt to distinguish the cases coming up from Circuit Courts. Mr. Justice Peckham evidently realized that they cannot be distinguished. He contents himself by stating that in the one case the court will overthrow the authority of the state court, and in the other case they will not assume jurisdiction.

After this glance at the cases we come back again to our starting point. As late as January 9th, in the current year, the federal court reasserted the doctrine that a state court's interpretation of a statute is a "law" within the meaning of the federal clause forbidding states to pass laws impairing the obligation of contracts; and that they refuse to apply it for that reason.[1] But in the latest case which we have examined on the other side, we find it just as positively stated that such interpretation is not a "law" within the meaning of the 25th section of the Judiciary Act. This is the situation, not entirely satisfying, which we find in that field.

B. An examination of cases coming up by writ of error to state courts where the act involves a contract.

As this class of cases has already been discussed in a former section, we shall not re-examine the early cases at this point. We wish, however, to ask careful attention to the very recent case of *McCullough* v. *Commonwealth of Va.*[2] The famous coupon cases of Virginia are well known, and also the frequent attempts of Virginia to limit her liability by legislative enactments. The original coupon act was passed on March 30, 1871, and provided for the issuance of coupon bonds, which

[1] Loeb *v.* Trustees of Ham. Co., *supra*, p. 27.

[2] 172 U. S. 102 (1898), Brewer, J.

were declared to be receivable in payment of taxes due the state. This act was uniformly held by the Supreme Court of Virginia to be a constitutional and valid act during a period of twenty-seven years. Finally, the Supreme Court of Virginia adjudged the act to be null and void, and the case, in which this action was taken, was then brought into the Supreme Court by writ of error.

The judgment of the lower court was entirely directed to an investigation of the original act. Nothing else was even mentioned. Mr. Justice Peckham, in his dissenting opinion, observes, "The opinion of the state court shows that the judgment went upon the original and inherent invalidity of the coupon statutes, and its judgment in that respect, as I shall hereafter attempt to show, gave no effect to any subsequent legislation."

The question was then squarely before the court. Is a decision adjudging an act void which, during a long period of years, the same court had held valid, a "law" impairing the obligation of contracts; or, in other words, had the court authority to review?

This is a peculiarly strong case. Mr. Justice Brewer observes: "Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guarantee of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force, and that all the transactions which have been had, based thereon, rested on nothing. Such a result is so startling that it, at least, compels more than ordinary consideration." These considerations were so powerful as almost to overthrow the court's hesitancy to call a spade a spade and admit that this decision was a "law."

The court did assume jurisdiction, but not upon the ground we have indicated. Instead, it cast about for an excuse to take cognizance of the case, and finally hit upon the expedient of saying that, while the decision did not *refer* to the later acts, yet its *effect* was to *uphold* them by removing the only constitutional bar to their validity; *i. e.*, vested rights acquired under the act of '71.

This reasoning is, indeed, most attenuated, and Mr. Justice Peckham, dissenting, effectually shatters it. He says: "The state court has held the coupon acts to be entirely void, because in violation of the state constitution in existence when they were passed. . . . This judgment did not give the slightest effect to the legislation subsequent to the coupon statutes. It simply held there were no coupon statutes because those which purported to be such were totally void. No subsequent statute was necessary, and none such was given effect to. Striking down the coupon statutes effectually destroyed any assumed right to pay taxes in coupons, and the subsequent legislation was needless and ineffectual."

This language is quoted, not because we concur in Mr. Justice Peckham's dissent, for we do not, but to show how completely the court failed to justify its assumption of jurisdiction on this ground.

We submit that the case was correctly decided, but that, though not directly asserted, the real ground of taking jurisdiction was because the State of Virginia was attempting to impair the obligation of contracts by judicial legislation.

If this be not admitted then we must concur with Mr. Justice Peckham that the court had no jurisdiction.

This case plainly indicates that the Supreme Court, realizing that *judicial interpretation does have all the force of law, and that a change of construction does impair the obligation of contracts just as effectually as positive statutes*, are eagerly catching at every theory, no matter how shadowy, to give them jurisdiction.

We hope the time is not far distant when they will cease offering apologetic theories for assuming the jurisdiction which is theirs by right.

C. The question of jurisdiction examined on principle.

In view of the conclusions worked out in the preceding sections of this paper, it was really unnecessary to discuss the action of the court under A and B, but we do so to show how grave is the situation before us, and that the court are already nearing the point where they are ready to accept the full theory of judicial legislation.

We cannot better illustrate the theory that the court have power to assume jurisdiction than by making use of the facts involved in *Railroad* v. *Rock*, which, it will be remembered, are similar to *Gelpcke* v. *Dubuque*, except in that the parties were both citizens of Iowa.

We will take Mr. Justice Miller at his word, and assume that no cases can be brought into the Supreme Court by writ of error under the 25th section of the Judiciary Act, unless the judgment of the state court has upheld a law passed subsequently to the making of the contract. As to the meaning of law, we quote from Mr. Justice Field's opinion in *Williams* v. *Bruffy*:[1] "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state within the meaning of the clause cited relating to the jurisdiction of the court."

The Iowa Supreme Court, in *Railroad* v. *Rock*, decided two separate and distinct points:

(1) That the legislative act was invalid.

(2) That that interpretation should be applied to the contract before it.

The first point the Supreme Court had no jurisdiction to review. It could no more interfere with it than it could have repealed a repealing act overturning the same law. But what about the second point? Here the state court *applied* an *interpretation of a statute* to a contract so as to impair its obligation. "That interpretation of a statute," as we have shown, is really an act of a legislative character. That part of the decision, which was purely judicial, upheld this "interpretation." It therefore upheld a "law." The fact that the same case involved both points makes the principle more difficult to see, but not less sound.

That a decision may involve both functions is not unfounded in authority. In the English case of *Winthrop* v. *Lechmere* a colonial act of Connecticut was declared void (because it was adjudged to be in conflict with the English law) by an order in council. The decision also involved a review of four

[1] 96 U. S. 176 (1877), Field, J.

judicial sentences, and one judicial order of the Superior Court of Connecticut. Mr. Brinton Coxe says: "In the writer's opinion, the order in council determining the appeal of *Winthrop* v. *Lechmere* was actually of a mixed nature. He deems it partly judicial and partly legislative. It was no mere judicial judgment. That part of it was judicial which reversed and set aside the four sentences and declared the order of the court to be null and void. That part of it was legislative which declared the two acts of the colonial legislature to be null and void. The writer understands this view to be supported by authority. In an order in council dated April 10, 1730, the order in council determining *Winthrop* v. *Lechmere* is referred to. The action therein taken concerning the Connecticut act for settling intestates' estates, is expressly called *a repeal of that act.*"[1]

This is precisely the position which we now assume. That part of the Iowa decision which declared the act null and void was legislative; it may be referred to in the language above cited, as a "repeal of the act." That part of the Iowa decision which upheld that "repeal" and so applied it as to impair the obligation of the contract before it, was judicial. It was, therefore, a judicial decision by the Supreme Court of the state, upholding and applying a "law" which impaired the obligation of the contract, and it should have been reviewed on writ of error by the Supreme Court of the United States.

The objection that this would throw open the door to a vast multitude of new cases, even if it were a legitimate objection, is not true. Mr. Justice Miller says that to allow writs of error in such cases would be "to permit an appeal to be taken every time a state court adjudged a contract to be void which we might think to be valid." It is submitted that this reasoning cannot be supported. It springs from the same fundamental error of assuming that it was the *construction of the contract*, and not the *interpretation of the act* which impaired its obligation.

We submit that, if a principle be correct, it should be made

[1] See Judicial Power and Unconstitutional Legislation, p. 212.

a rule of action, even though additional cases will thereby be admitted to the courts, and that the vast horde of contracts, adjudged void, which Mr. Justice Miller saw, in his imagination, ready to swarm into the Supreme Court as soon as they opened the door to cases like *Railroad* v. *Rock*, had no existence elsewhere. Cases like *Railroad* v. *Rock* would in all probability be less numerous than those like *Gelpcke* v. *Dubuque*.

Mr. Justice Miller further declares that there could be here no impairment, because the state court by its construction of its own statute, which was conclusive, had decided that no contract ever existed. This is arguing in a circle. It assumes in the first place that a state decision altering its former interpretation and declaring a statute void, makes it void *ab initio*, which is the very point at issue, and, in the second place, it again confuses the two separate and distinct things, the interpretation of the act and the construction of the contract.

It is said further that the federal clause is aimed at the legislative acts of the states and not at the decisions of its courts. This is of course true in theory. But this theory is not contradicted because, as we have shown, the decisions in the cases we are discussing are "legislative acts" in their intrinsic nature.

It is also declared that to allow writs of error would be to permit the Supreme Court to interfere with the state court's construction of state statutes. As we have already pointed out, in no sense would this be true. The federal clause, while theoretically aimed at the fundamental power of the state to make the law, really operates by preventing the application of forbidden laws by the state courts. As the Supreme Court cannot get out a writ of injunction to prevent a state from passing a law impairing the obligation of contracts, nor repeal it when it has been passed, so they cannot prevent nor change the state court's construction of its laws. In both cases the power of the court is simply preventive.

They say to the state legislature, "Pass what laws you please, we have no power to prevent you, but if your courts so apply a law as to impair the obligation of a contract *in a*

particular case, then we shall step in and protect that contract." In most cases this practically nullifies the law, but in any case the court do not go beyond the rights which they are protecting. The law may impair the obligation of the contract before them, and yet be valid as to other contracts. In such a case the court content themselves with neutralizing its effect in the case before them.[1]

So, in the same manner, the Supreme Court, addressing themselves to the state court, say: "Interpret your laws as you see fit. We have no power to prevent you. But if you so apply an interpretation as to impair the obligation of a contract, then we shall protect that contract."

To both the court say: "Whatever you may or may not do, here is one field into which you may not enter. We stand here by virtue of the duty and privilege laid upon us by the Constitution of the Union to prevent it, and we shall prevent it. But we have no intention of interfering with you in those fields where we admit you to be supreme."

The fear that the liberty of the state court to interpret its own laws will be taken away is thus seen to be unfounded. The power to do that does not exist. It is only the purely judicial action in *applying* either the statute or the interpretation of that statute which can be reviewed by the Supreme Court.

After all, the objection most often urged to permitting writs of error in this class of cases is a technical one. It is said that the judiciary act provides that a subsequent law must be upheld before the writ can be allowed. We believe that upholding an authoritative interpretation of a statute is upholding a "law." But if we are to be hindered by a procedural difficulty, when we are resting upon our constitutional rights, the difficulty should be obviated by altering the language of the act.

Although sometimes said, with fine irony, to be quite unusual in the law, it may not be amiss to survey this question, for a moment, from the standpoint of common sense.

[1] Sturgis *v.* Crowninshield, 4 Wheat. 122 (1879), Marshall, C. J.

Every one can see that to permit a court to unsettle rights, acquired during a long period of years, upon the faith of a law, sanctioned by every department of government, ought not to be allowed. Every business man knows that a system which makes it impossible for one ever to be sure what the statute law is, is most dangerous to the welfare of the community. It does not require one learned in the law to see that the decisions in *Gelpcke* v. *Dubuque* and kindred cases are pre-eminently just.

This may not be an argument, but, as practical men, we know that the law exists for the purpose of doing justice, and this fact should cause us to think twice before rejecting a theory which admittedly has always been just in its application, and before we refuse to apply that principle to a class of suitors equally as deserving as those to whom relief is granted.

Moreover, the full significance of the action of the court in refusing to assume jurisdiction has never yet been fully realized. If a state can, by judicial legislation, pass laws impairing the obligation of contracts, it can also, in the same manner, enact *ex post facto* laws. Suppose, to take an extreme case, the offence of horse stealing at common law is punishable with death. Suppose a state passes a law reducing the punishment to fine and short imprisonment. Suppose, for a long period of years, this act is enforced by the courts and is uniformly held to be constitutional. The court then reverses its ruling and declares the act null and void. If Mr. Justice Miller's reasoning be correct, all those individuals who have stolen horses in the meantime can be condemned to death. It is no answer to say that the state would probably not take such action. If the principle be sound it must be correct in all possible situations. We submit that if a state should attempt, by judicial action, to thus in effect enact an *ex post facto* law, the Supreme Court would speedily forget their procedural scruples and would assume jurisdiction.

As lawyers, we know that judicial legislation is a fact with which we have to deal. We know that the states can and often do impair the obligation of contracts with impunity by means of legislative-judicial action. We see also a constantly

increasing tendency on the part of the state courts to constitute themselves not only the judges of the *constitutionality* of legislative acts, but even judges of whether a law be not, in their opinion, *improper*, as appears from the opinion of a judge who arrogates to himself the right to overturn a law,[1] because it "is a species of sumptuary legislation which has been universally condemned as an attempt to degrade the intelligence, virtue and manhood of the American laborer and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave and the laborer an imbecile." This *is judicial legislation*, whatever may be thought of the principle. It should, in all cases, be recognized as such, and its effect defined and restrained, not given the unlimited extent of purely judicial decisions.

[1] State *v.* Goodwill, 33 W. Va. 802 (1889).

Authorities bearing on question of Federal Courts following state decisions in construing state statutes, etc.

"Provinces of the written and unwritten law." By Jas. C. Carter.

"The Ideal and Actual in Law" By Jas. C. Carter.

5 Harvard Law Review, 172, Prof. Thayer.
4 " " " 411 " "
6 " " " 21 " Grey
8 " " " 328 " Sand
29 Central Law Journal, 465, 485, Meigs.
9 American Law Review, 381
14 " " " 211-216
12 " " " 190
23 " " " 190
22 Southern " " Article by Meigs.

Holland's Elements of Jurisprudence, Sec. 61.

2 Thayer's Constitutional Cases, 1351 N.

Wambaugh Study of Cases, 78 & 315 N.

197 U.S., 544.

As to what is a question of general jurisprudence, see 29 Central Law Journal, 468, N.